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Determining Mode of Trial:
An Analysis of Decision Making in Magistrates' Courts

by

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A thesis submitted for the degree of Doctor of Philosophy in Law

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For the late Joseph Bell Cammiss

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Finally, this thesis is dedicated to the memory of my late grandfather, Joseph Bell Cammiss, who unfortunately died months before submission. Without his love, support, kindness, guidance, wisdom and strength I would not be the person who I am today. My only regret is that he has not been able to see me complete the thesis.

DECLARATION

This thesis is all my own work and has not been submitted for a degree at this, or any other university.

Abstract

The thesis examines mode of trial decisions in magistrates' courts within the context of a theoretical framework that views courtroom interaction as multifaceted and complex. The history of the mode of trial decision has seen an extension of summary jurisdiction; for reasons of cost and efficiency successive reforms have aimed at reducing the number of cases that are committed to the Crown Court. It is thought that inappropriate cases are being committed to the Crown Court, yet the magistrates' court is criticised for providing poor quality justice. This thesis therefore examines the dynamics of the mode of trial decision in order to understand how the process operates.

The theoretical framework examines different influences upon social interactions; psychobiography, the courtroom setting, the dynamics of interactions and wider social structures that frame behaviour. This is conducted through an examination of the narrative (re)production practices of courtroom professionals.

The thesis finds that legal considerations dominate the mode of trial process with local legal cultures deeply influencing the decision. However, where discretion remains, sociological influences can be ascertained as impacting upon behaviour. For instance, the treatment of domestic violence cases show how institutional and professional concerns enter the mode of trial decision; prosecutors, utilising the ability to control information that comes before the court, minimise the impact of cases so as to persuade the magistrates to retain jurisdiction. Additionally, the legal narratives (re)produced in the courtroom highlight a number of considerations for the nature of law. Law, when taking defendant's, witnesses' and complainant's stories, translates these into narratives that are appropriate for the legal process. As a result, the voices of the participants are lost in the courtroom narrative.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This thesis analyses the mode of trial decision in magistrates' courts for either way offences. Historically, the mode of trial decision has been regarded as problematic; the cost of Crown Court proceedings, combined with a concern to reduce delay, have led to an increase in the extent of summary jurisdiction. Nevertheless, the belief that inappropriate cases are being committed to the Crown Court, either because defendants have elected Crown Court trial only to subsequently plead guilty or cases have been committed and received, after conviction, a sentence within the powers of the magistrates' court, has resulted in continued dissatisfaction with the mode of trial process. This study was therefore initiated with the aim of examining the decision making practices of magistrates and the mechanics of the mode of trial decision. This legal process has been examined within a theoretical framework that seeks to understand courtroom interactions as multifaceted with numerous influences on decision making. While acknowledging the importance of legal reasoning to the courtroom process, the theoretical framework develops an understanding of courtroom processes that looks to different levels of social interaction as influential. The importance of personality, the particular setting of the courtroom, the nature of law, the mechanics of social interactions and the structures that frame behaviour are all examined.

The research was conducted by direct court observation of two courts within the same CPS area; the researcher was attached to this CPS area for the duration of the fieldwork. The findings of the research show legal considerations to be dominant in the mode of trial process. A multitude of case factors interact to help influence the prosecutor's recommendation on venue and the decisions of magistrates. Practice has also resulted in the creation of legal cultures whereby some categories of offences are routinely processed in a predictable way. However, discretion remains in the process; it is here that sociological influences upon behaviour can be seen. The treatment of domestic violence cases have been highlighted as a discrete category where the practices of the prosecution are influenced by institutional constraints; in an effort to avoid Crown Court trial, cases are managed so as to minimise the impact of the allegations.

1.2 The value of the thesis

It is worthwhile taking time briefly to examine the nature of the research and explain how this builds upon earlier work. A small body of research has already been completed on mode of trial decisions.¹ While this thesis examines the same subject matter, it is different in a number of important respects. The earlier work was predominantly focused upon the defendant's decision to elect. While the prosecutor's and magistracy's role was examined in this earlier work, this was either a side issue, or did not receive adequate attention. This thesis is different, in that the researcher was attached to a CPS office. While prosecutor's views

¹ See section 2.5.

were sought in the past, this did not take place in the context of direct observation with the ability to converse with prosecutors. This leads to the second feature of this research; the methods employed. Previous research consisted of interviews with courtroom professionals or defendants on their views on mode of trial or examined records. The research for this thesis was conducted within two magistrates' courts and was based on direct observation. The subtleties of the courtroom interaction were therefore directly observed with the ability to speak to prosecutors 'on the ground'. Relations were developed with prosecutors over eight months, allowing for a thorough understanding of the courtroom actor's work. Finally, the thesis locates the mode of trial decision in a wider analysis of social interactions. The theoretical framework developed in the thesis, while understanding the importance of the *legal* decision, reaches out to sociological understandings of interactions. Courtroom decisions are viewed not as simple legal decisions, nor as pertaining to a simple 'black-box' response-stimulus model of interaction. Rather, courtroom interactions are described as multi-faceted, where different aspects of the social environment are highlighted as influencing and framing decisions. While priority is given to the nature of law and the narrative (re)production process within the courtroom, other methods of understanding are noted.

However, it is this examination of courtroom narrative (re)production where the importance of the research lies. While there has been an increased interest in law and narrative, the approach of the thesis in examining the storytelling practices of lawyers is uncommon in legal analysis and offers valuable insights into the nature of legal practice. Law and Narrative is a relatively new discipline, with

most research originating in the US. While Narratology is an established literary discipline, and has been utilised in other areas, its application in law is a recent phenomenon. This interest in narrative has mostly focused upon how stories can bring a different perspective to the law. Storytelling, with its emphasis upon the particular and specific, is seen as a useful challenge to the generality of law, with its focus upon the universal and the norm. Storytelling is thereby seen as a means of providing opposition to dominant legal discourse and the ideals contained within law (Brooks and Gewirtz, 1996; Minow, 1996; Posner, 1998). However, this thesis pierces this simplistic view of the usefulness of narratives in law through an examination of law's narrative (re)production practices. The thesis suggests that lawyers (re)produce narratives in a particular form; one focused upon legally relevant details. As a result, the details selected for inclusion point to the generality and universality that exists in law. While this questions the conclusions of the particular US Law and Narrative school examined above, it also offers insights into the nature of law and the stories that people take to legal professionals. The translation process inherent in the construction of legal narratives alters the stories that people take to the law. What is more, this process is inevitable as it concerns the application (or construction) of 'facts' to fit with legal criteria; the very essence of legal practice.

1.3 The development of the thesis

While the thesis developed in a manner that led to an examination of the narrative (re)production practices of prosecutors, this was not the initial aim of the thesis. Rather, the research was undertaken with an eye on the policy debates

surrounding mode of trial and what was regarded by commentators and policy makers as the problematic nature of the decision making process.² It was hoped that the research would answer numerous questions on the mode of trial process that are addressed in Chapter 2. However, as is made clear in more detail in Chapter 5, the aims of the research developed for both practical and theoretical reasons. A number of the questions that were to be addressed were outside of the competencies of a lone researcher; a research team would be necessary to track cases through to the Crown Court and this was simply not possible. More importantly, while in the field, the nature of the mode of trial decision making process was seen to be such that a change of focus was necessitated. Early expectations as to the form of verbal statements within the courtroom did not prove to be as anticipated. Rather than interaction taking place through a conversational turn-taking sequence (Atkinson and Drew, 1979), the participants effectively seemed to be delivering a narrative, with the prosecutor being the main protagonist. Indeed, defence solicitors usually remained silent while one of the most important features of magistrates' courts work – negotiation and bargaining (Baldwin and McConville, 1977) – was largely absent from the mode of trial process. While defence solicitors would frequently speak to prosecutors about venue, they rarely attempted to influence the decision. Also, given the manner in which prosecutors were able to control the information placed before the court,³ a picture emerged of the importance of the prosecutor in the mode of trial process above all other participants.

² See Chapter 2.

³ See Chapter 7.

The thesis is therefore presented in a manner that adequately represents this developmental aspect to the research. Chapter 2 outlines the policy debates alluded to earlier and examines the history of mode of trial and the legislative and administrative reforms that have been implemented. This chapter, to some extent, represents the starting point of the research and throws light on the early development of the thesis. Chapter 3 continues this through an examination of magistrates' courts and magistrates' justice. This chapter represents the initial focus of the research; the debates on mode of trial frequently addressed the quality of justice in magistrates' courts and the mode of trial decision takes place within the magistrates' court. This early chapter therefore situates the work in Chapter 2. However, the development of the thesis, as outlined above, was such that some of the issues addressed in Chapter 3 were left behind. As a result, Chapter 4 develops a more theoretical approach to courtroom decision making, and turns towards wider social theory in an effort at understanding courtroom interaction. These three chapters, 2, 3 and 4, all evidence the development of the issues and show a progression from a narrow to a wider focus. The mode of trial debate is initially described on narrow policy grounds and situated within the debates on magistrates' justice. However, Chapter 4 then looks even further to sociological understandings of decision making. After a discussion of methods and methodology in Chapter 5, the analysis Chapters, 6 and 7, revisit this progression. Chapter 6 provides a mainstream qualitative analysis of the mode of trial hearing while Chapter 7 examines micro- and macro-influences on behaviour through narrative (re)production processes. Given the importance of the prosecution, as outlined above, both of these chapters focus upon the way in which prosecutors frame their recommendations.

This should explain the development of the thesis and outline the very different approaches inherent in each chapter. The thesis, in utilising these very different ideas, therefore examines mode of trial from numerous perspectives that have to be understood as a coherent whole. The thesis manages this through a presentation of the different stages of development of the research with different chapters focusing upon different aspects of the decision. It is also clear that throughout the thesis further development of many of these ideas could have been expressed, but this was not possible due to reasons of space. On one level therefore, the thesis provides a general examination of the decision making process, but for practical and theoretical concerns, only some of these aspects have been examined in detail. Before the thesis moves to an examination of the issues, a more detailed overview of the thesis is in order.

1.4 Overview

Chapter 2 introduces the procedure for determining venue, the categories of criminal cases that are subject to the venue decision, and the political debates that bound this legal framework. Jury trial is regarded by many commentators as a fundamental legal right existing from Magna Carta. However, successive legislative and administrative reforms have eroded this right and increased the extent of summary jurisdiction. The right of election has been regarded as problematic, in that defendants have exercised it inappropriately; either sentences are within the powers of the magistrates' court or the defendant has pleaded guilty, thereby not utilising the supposed advantages of Crown Court trial.

However, while reforms have increased the extent of summary jurisdiction, the right to elect Crown Court trial in either way cases has remained. Additionally, while some research has noted the importance of the magistracy and prosecution for mode of trial, reforms have merely tinkered with their roles. As a result, Chapter 2 calls for an appreciation of the importance of the magistracy and prosecution in the mode of trial decision.

Chapter 3 builds upon this call in Chapter 2 by reviewing the literature on magistrates' justice. The evidence on the magistracy's composition – while the bench is now predominantly gender balanced with ethnic minority communities well represented, there remains a preponderance of middle aged and middle class magistrates – is examined with an analysis of the quality of justice in magistrates' courts.

Chapter 4 widens the focus of the research; a theoretical framework is advanced that moves towards a sociological appreciation of courtroom interactions. Layder's (1997) theory of social domains is utilised as a template to organise earlier research on courtroom behaviour. The theory of social domains suggests that any social interaction is influenced on four different levels; the psychobiological, the interaction, the setting, and the contextual resources that each party brings to the interaction. The psychobiological looks to the importance of individual personality and life history upon an interaction. The interaction itself is bounded by informal rules and norms that guide the construction of interactions. The setting is concerned with the institutional pressures that shape and frame an interaction, whereas contextual resources are

wider social structures within which interactions take place. The focus of the thesis is upon contextual resources with particular emphasis placed upon language, narrative form, the nature of law as social practice, and legal discourse. Overall, Chapter 4 seeks an understanding of courtroom behaviour firmly situated as social practice within a specific legal site.

Chapter 5 discusses methodology and the methods utilised to collect and analyse the data. The narrative of the research project is outlined, along with a defence of direct observation as a data collection method. Narrative analysis, used as one tool to analyse the data, is also described and its utilisation explained.

Chapter 6 is the first of two analysis chapters; this Chapter examines the legal basis of the mode of trial decision. While sociological aspects of the decision-making process are important, Chapter 6 firmly grounds the analysis in an understanding of the legal factors that guide decision making. This Chapter is important for two reasons. Firstly, sight must not be lost of the legal aspects of the process. While law may be one of many contextual resources brought to the interaction, it is of fundamental importance for the manner in which it bounds the behaviour of the courtroom participants and how it is all pervasive in their work. Secondly, an understanding of law is vital when attempting to assess the influence of other social domains.

Chapter 7 examines the evidence on the influence of social domains upon action. This is predominantly achieved through an analysis of the storytelling practices of the prosecutor. Analyses of these narratives show how lawyers tell stories in a

manner that may be alien to many outside the courtroom. Domestic violence cases are examined as a particular example of narrative (re)production processes.

Chapter 8 concludes the thesis by drawing the threads together, examining the mode of trial process and making a number of observations on the nature of law and criminal legal practice. The importance of legal considerations for the mode of trial process are highlighted along with the discretion inherent in the decision. Consideration is given to the sociological explanations of behaviour, the narrative construction practices of lawyers and how these result in a silencing of complainants, defendants and witnesses. Finally, reform of the mode of trial process is contemplated along with an appraisal of the possibility of (re)finding the voices of the participants.

CHAPTER TWO

THE MODE OF TRIAL CONUNDRUM

2.1 Introduction

Throughout recent times we have seen many periods of prolonged public anxiety concerning crime and anti-social behaviour (Cohen, 2002). Although there is nothing new in these moral panics about deviance (Pearson, 1983), there has been a qualitative shift in the response of state authorities and politicians to the problem of crime. The post-war consensus on criminal justice issues has been consigned to history with crime now firmly on the political agenda (Morris, 1989), while politicians and the agents of social control have had to grapple with the paradox of being seen to do something about the problem while recognising the increasing ineffectiveness of state action (Garland, 1996). The calls for an official response to the problem have led to an increase in the workload of criminal justice agencies with a corresponding increase in the *official* rates of recorded crime. This higher workload has contributed to a radical shift in the culture of criminal justice; gone forever are the halcyon days of *Dixon of Dock Green* to be replaced by the search for a modern, effective and efficient criminal justice system.⁴ The search for economy and effectiveness encapsulated by the New Public Management ethos⁵ has spread to the criminal justice process and other areas of the public sector. This has resulted in criminal justice agencies increasingly accounting for their resource allocation, combined with the adoption

⁴ See Reiner (1992) for instance for a brief examination of some of the problems of modern policing.

⁵ See Osbourne and Gaebler (1994) for an elaboration of New Public Management.

of managerialist cultures consisting of performance measurement and output orientated audit procedures (Raine and Wilson, 1993). This search for economy and effectiveness has influenced a reformist agenda that is revisiting the effectiveness of ancient institutions with long and often cherished histories.⁶

In order to modernise these institutions, there has been an unprecedented level of legislative activity and management focused reorganisations over the last twenty years. Even the Crown Prosecution Service, a relatively recent creation, has been subjected to numerous reviews and reports since its establishment in 1986 (Home Office, 1998c). As part of this process, mode of trial has been subjected to regular scrutiny and legislative activity. It has been the subject of dispassionate reviews, such as that conducted by the James Committee (Home Office and Lord Chancellor's Office, 1975), and polemic exchanges, as seen in both Houses of Parliament during the debates on the recent Criminal Justice (Mode of Trial) Bills in 1999 and 2000. Throughout the consideration of this vexed question, there exists a tension between the preservation of ancient traditions and institutions and the perceived needs of a modern age.

This Chapter introduces the issues concerning mode of trial; the research conducted on this question will be examined, the reviews in this area will be analysed and the relevant legislative activities from the past thirty years will be considered. This history of mode of trial will introduce issues that reappear throughout the thesis. Before these tasks are performed, the classification of criminal offences and the procedure for determining venue will be addressed.

⁶ The Metropolitan Police date from 1829 (Reiner, 2000), the office of Justice of the Peace dates back to 1361 and the Statute of Westminster of that year (Milton, 1967; Moir, 1969), while the roots of trial by jury can be traced to Norman times (Auld, 2001).

2.2 The classification of criminal offences

Enacted in the wake of the deliberations of the James Committee (Home Office and Lord Chancellor's Office, 1975), the Criminal Law Act 1977 reorganised the classification of criminal offences in England and Wales into three different categories: indictable, summary and triable either way.⁷ Prior to the report of the James Committee there was a need for simplification, due to the sheer number of categories and a lack of any overarching coherence to the categories (Thomas, 1972).

Schedule 1 to the Interpretation Act 1981 defines the new categories of summary, indictable and either way offences; indictable offences are any that can be tried on indictment (in the Crown Court) while summary offences must be tried summarily (in the magistrates' court). Offences that are triable either way can be tried in either the magistrates' or Crown Court. The arrangements for the classification of individual offences depend upon whether or not the offence is a statutory or common law offence. Common law offences are indictable only offences, unless they are listed in Schedule 1 of the Magistrates' Court Act 1980. Statutory offences are either classified by the creating statute or listed in Schedule 1. If a statute provides for conviction summarily and on indictment, with differing penalties for each, then the offence is triable either way. If the statute imposes a maximum penalty that is within the range of the magistrates' court and provision is not made for trial on indictment, then the offence is

⁷ Strictly speaking there are only two categories as either way offences are a sub-category of indictable offences.

summary only. If the statute only provides for conviction on indictment then the offence is indictable only, unless it is listed in Schedule 1. A short list of either way offences would include: burglary, theft and related dishonesty offences, middle ranking assaults under the Offences Against the Person Act 1861 such as assault occasioning actual bodily harm, indecent assault, criminal damage, affray, and violent disorder.

2.3 The procedure for determining venue

All criminal proceedings are initiated in the magistrates' court: summary offences remain in the magistrates' court while indictable only offences are sent to the Crown Court.⁸ The procedure for either way offences involves the court making a decision on venue, with the defendant retaining a right to elect Crown Court trial.⁹ Initially the magistrates ask the defendant to indicate a plea to the offence charged. If the defendant indicates a plea of guilty, the bench will accept jurisdiction and either sentence the defendant, adjourn for pre-sentence reports, or commit the defendant to the Crown Court for sentencing.¹⁰ If the defendant indicates a plea of not guilty, or declines to indicate a plea, the bench must next decide the correct venue for any subsequent trial. Both the prosecution and defence are invited to make representations and in making its decision, the court must consider a number of different factors that include: the nature and

⁸ Crime and Disorder Act 1998, section 51.

⁹ Criminal Procedure and Investigations Act 1996, section 49.

¹⁰ Magistrates Court Act 1980, section 38, as amended by the Criminal Justice Act 1991, section 25.

seriousness of the case, whether the court's sentencing powers are sufficient or any other relevant circumstances.¹¹

These considerations are supplemented by the National Mode of Trial Guidelines that were initially advertised in a practice note in 1990 and subsequently amended and reissued in 1995.¹² The guidelines consist of two sections; the first outlines general considerations while the second details offence specific guidelines. In the general guidelines, the court is advised that any decision should not to be based upon 'convenience or expedition', the court is to assume that the prosecution can prove their version of events, previous convictions or mitigating circumstances are not to be taken into account, and the Crown Court is more appropriate for difficult questions of fact or law. Courts are reminded of the power to commit for sentence if the defendant is subsequently found guilty and the powers of the trial court are deemed to be insufficient. Finally, the guidelines create a presumption that cases should be tried in the magistrates' court.¹³ This presumption is rebutted when the court's sentencing powers are insufficient and the case has one or more features outlined in the offence specific guidelines. These guidelines relate to specific offence categories such as offences against the person, drugs offences, property offences and public order offences. For instance, the court should consider declining jurisdiction in any assault charge if the sentencing powers of the magistrates' courts are deemed to be insufficient and the defendant used a weapon that was likely to result in serious injury or used a

¹¹ Magistrates' Court Act 1980, section 19(2)(b) and 19(3).

¹² [1990] 3 All E.R. 979-981. The new guidelines have not been published as a practice note, although they can be found in Blackstone's Criminal Practice (Murphy and Stockdale, 2003), while the 1990 direction has not been withdrawn (White, 1996).

¹³ Contrast with the Report of the James Committee that recommended that there be no presumption either way. See section 2.6.1.

weapon that caused serious injury.¹⁴ The guidelines aim to influence magistrates to retain cases:

Practice Directions and Notes as presently published can give little idea of the presentational devices used in the little red booklet [given to magistrates]. For example, on almost every page of the booklet a formula is repeated which drives home the message (although not in these words) ‘try the case summarily if you possibly can’ (White, 1996: 476).

The desire to retain cases within magistrates’ courts is explained in the research conducted into mode of trial, official statistics on mode of trial, and the ways that these statistics and research findings have been used in subsequent reviews, reports and as a basis for legislation.

2.4 Official statistics

Before any statistics are examined, attention will be drawn to the counting practices of the different agencies that compile criminal statistics.¹⁵ The analysed statistics are: *Judicial Statistics* (Department for Constitutional Affairs, 2003b); *Criminal Statistics* (Home Office, 2002a); and statistics provided by the CPS (Crown Prosecution Service, 2003).¹⁶ *Criminal Statistics* on court proceedings,

¹⁴ The remaining guidelines for assaults concern the method of any assault (kicking or head-butting), characteristics of the victim (public servants, the elderly or infirm etc.) and the existence of any racial motivation.

¹⁵ For a fuller analysis of the counting practices used for official statistics, see Chapter 4 of the Glidewell report (Home Office, 1998c).

¹⁶ The reports listed here are the most recent reports of each type; although they provide statistics for previous years earlier reports have also been analysed to obtain a more comprehensive data set. For *Criminal Statistics* the reports for 1993, 1994, 1995, 1996, 1997 and 2001 have been examined (Home Office, 1994; 1995a; 1996; 1997a; 1998b; 2002a). In addition to *Judicial Statistics* for 2002 those for 1997 have been consulted (Constitutional Affairs, Department of, 2003b; Lord Chancellor’s Department, 1998a). Finally, seven different *Annual Reports* of the

CPS statistics and *Judicial Statistics* all record information on defendants; each defendant in a criminal proceeding counts as one person or case. If a defendant pleaded guilty in one set of criminal proceedings to three different offences, that would be recorded as one case. The information received for court proceedings for *Criminal Statistics* is provided by magistrates' courts and Crown Courts, the CPS produce their own figures and the Court Service produce *Judicial Statistics*. The discrepancies between the three sets of figures is somewhat surprising given that they originate from similar sources and use similar accounting practices (Home Office, 1998c). However, there are reasons for the differences. *Judicial Statistics* include prosecutions by all agencies, while the CPS only counts prosecutions in which it is the prosecuting authority. Prosecutions by the Inland Revenue and Customs and Exercise are excluded. *Criminal Statistics* and *Judicial Statistics* work on the basis of calendar years while the CPS compiles figures for financial years (Home Office, 1998c). As well as these general counting practices there are two other issues to consider. Firstly, the CPS has recorded statistics in their current form from 1991.¹⁷ Secondly, the relevant tables in *Criminal Statistics* were first produced in their current form in 1989.¹⁸ So long as these problems are appreciated, and there is no attempt to directly compare one set of figures with another, there is merit in inspecting the figures to gain an impression of any general trends and patterns in the courts' workloads.

CPS were inspected (Crown Prosecution Service, 1992; 1993; 1994; 1995; 1997; 1999; 2001a; 2003).

¹⁷ Information is available on the proportion of indictable cases sent to the Crown Court on the direction of magistrates or the election of the defendant for the years 1987 and 1988.

¹⁸ Any information previous to this year concerns defendants over the age of 17, while the information available after that date concerns defendants over 18.

The division in workload between the two courts is clearly identifiable: there has been a gradual reduction in the workload of the Crown Court since the early 1990s and most criminal cases remain in the magistrates' court. The data reproduced below fails to account for summary matters, yet it still remains that the vast majority of cases are conducted in the magistrates' court. Finally, plea before venue¹⁹ has resulted in a large-scale reduction in committals for trial and magistrates are now responsible for more committals to the Crown Court.

Table 1 gives the first indication of the general decline in committals for trial from a peak in the early 1990s and late 1980s.

Table 1: Cases received in the Crown Court – committals for trial and sentence²⁰

Year	Committals for trial	Committals for sentence
1987	98,873	11,653
1988	106,524	13,091
1989	98,668	13,178
1990	103,011	15,270
1991	104,754	16,554
1992	100,994	14,883
1993	86,849	11,088
1994	89,301	11,485
1995	81,186	11,718
1996	83,328	12,002
1997	91,110	14,871
1998	75,815	29,774
1999	74,232	31,928
2000	71,022	27,591
2001	80,551	25,960
2002	83,449	28,837

Source: *Judicial Statistics*.

From Table 1 it is apparent that the workload of the Crown Court was at its height in 1988 and peaked next in 1991. This peak coincides with the deliberations of the Royal Commission on Criminal Justice (1993), that

¹⁹ See section 2.6.4.
²⁰ Committals for sentence only pertain to either way cases whereas committals for trial include indictable only and either way cases.

recommended the right of defendants to elect jury trial be restricted, and the introduction of the National Mode of Trial Guidelines that created a presumption in favour of summary trial for either way offences.²¹ Since this peak, there has been a gradual reduction in the workload of the Crown Court.²² Turning to CPS statistics in Table 2, there is a similar reduction in elections by defendants and in the number of cases that magistrates decline jurisdiction.

Table 2: Crown Court – source of committals for trial

Year	Magistrate's direction	Defendant's election	Indictable only	Magistrates direction as a percentage of either way cases
1987-1988	48,787	49,740	16,529	50
1991-1992	61,867	35,584	21,719	63
1992-1993	54,738	32,865	20,707	62
1993-1994	46,954	25,249	19,545	65
1994-1995	51,181	26,612	20,163	66
1995-1996	50,158	24,768	22,083	67
1996-1997	49,026	21,472	23,872	70
1997-1998	56,069	21,653	27,341	72
1998-1999	44,269	18,391	26,918	71
1999-2000	40,097	18,572	28,162	68
2000-2001	38,914	16,351	27,333	70
2001-2002	36,740	14,956	32,639	71
2002-2003	40,274	15,051	39,221	73

Source: CPS Annual Reports.

This general pattern of high Crown Court workloads in the early 1990s with subsequent reductions can also be seen in figures from *Criminal Statistics* in Table 3. Table 3 deals with all either way cases committed to the Crown Court. This shows a peak in the early 1990s of committals for trial, with a subsequent decline and a more marked reduction after 1997 that resulted from the introduction of plea before venue.

²¹ [1990] 3 All E.R. 979-981.
²² The marked difference between 1997 and 1998 for both columns in Table 1 is attributable to plea before venue, an administrative reform that will be analysed in section 2.6.4.

Table 3: Persons aged 18 and over proceeded against and committed for trial for either way offences

Year	Number proceeded against (Thousands)	Committed for trial (Numbers, thousands)	Committed for trial (Percentage of those proceeded against)
1989	360.5	75.5	21
1990	379.0	75.9	20
1991	399.7	77.3	19
1992	401.7	70.6	18
1993	392.6	64.7	16
1994	402.1	67.2	17
1995	367.4	59.0	16
1996	363.5	58.7	16
1997	384.4	63.2	16
1998	402.9	49.1	12
1999	405.0	48.2	12
2000	382.4	45.9	12
2001	384.4	47.0	12

Source: *Criminal Statistics*.

Table 3 also shows the total number of either way cases in the magistrates' court from 1989. As a proportion of all either way offences, committals for trial have declined and there is a large reduction in 1998 from the introduction of plea before venue. The gradual decline in the number of committals for trial cannot be accounted for in any reduction in either way cases before the magistrates' court, but is rather the result of a smaller proportion of such cases being sent to the Crown Court. Table 2 suggests this decrease is the result of fewer elections by defendants and magistrates retaining jurisdiction in more cases.

Table 3 also suggests that most criminal cases are disposed of in the magistrates' court; in 2001 only 12 percent of either way cases were committed for trial to the Crown Court.²³ When committal rates were at their height in the statistics presented in 1989, only 21 percent of all either way offences were committed to the Crown Court. In other words, the vast majority of either way cases remain in the magistrates' court. Add to this preponderance of either way offences in the

²³ Further either way cases would have been sent to the Crown Court as committals for sentence after a finding of guilt.

magistrates' court the numerically largest category of summary only offences, and it is apparent that magistrates' courts preside over the vast majority of criminal cases; over 93 percent (Royal Commission on Criminal Justice, 1993).

Even though most either way offences remain in the magistrates' court, these constitute the majority of cases in the Crown Court, although they are reducing as a proportion of all cases. This is evident from Table 2. As magistrates have retained more cases and elections by defendants have been falling, there has been an increase in indictable only cases in the Crown Court from 16,529 in 1987-1988 to 39,222 in 2002-2003. Despite this, indictable only cases merely constituted 41 percent of the Crown Court's workload in 2002-2003, although they did constitute a mere 14 percent in 1987-1988. However, caution should be exercised, as these figures do not include committals for sentence that greatly increased after the introduction of plea before venue.

The Tables evidence a clear reduction in committals to the Crown Court for trial post 1997, with a corresponding increase in committals for sentence. Before the introduction of plea before venue in October 1997, magistrates decided upon venue before the defendant entered a plea. The effect of this change is that the court now requests from the defendant an indication of plea before considering venue. Only if the defendant pleads not guilty, or refuses to indicate a plea, will the bench consider jurisdiction. As a result, any defendant who intended to plead guilty, and previously either elected Crown Court trial or was committed to the Crown Court because the magistrates declined jurisdiction, was no longer committed to the Crown Court for trial. Instead, their indication of plea is

accepted as an effective guilty plea and the court then proceeds to sentence. Some cases that were previously deemed not suitable for summary trial by magistrates before the entering of pleas are now committed for sentencing after the acceptance of a guilty plea and a decision by magistrates that their sentencing powers are insufficient. The effect has been to change the status of cases that are committed to the Crown Court from committals for trial to committals for sentence, with no obvious large scale reduction in the numbers of cases that reach the Crown Court (Bridges, 1999).

2.5 Research on mode of trial

Although there has been no shortage of reviews, reports and legislative activity in this area, there is paradoxically a lack of interest from the research community. A small number of research studies directly examine mode of trial decisions and an equally small amount of research considers mode of trial in some other context. Additionally, this research is of an age that caution should be exercised when utilising the findings to comment upon the procedure as it now exists. If nothing else, a number of administrative reforms (such as plea before venue) may have amended courtroom practices to the extent that this research is no longer relevant. Having regard to these caveats, the research will be examined in three parts; the first outlines how cases get to the Crown Court, the second examines what happens to these cases, and the third looks at the claim that Crown Court trial should be restricted.

2.5.1 How cases get to the Crown Court

Magistrates are now responsible for the majority of cases that reach the Crown Court; more either way cases are sent to the Crown Court because magistrates decline jurisdiction rather than defendants electing Crown Court trial. However, there is a lack of research explaining their decision making processes. In comparison, there is more research on defendant's choices, but nevertheless there is still insufficient material to draw any firm conclusions from this data.

Riley and Vennard (1988), in a sample of 909 cases in four Crown Courts and four magistrates' courts, reported that of those cases that went to the Crown Court (466), magistrates declined jurisdiction in 165 cases, the defendant elected trial in 244 cases, with this information not available in 57 cases. Therefore, on the basis of the available information, the bench declined jurisdiction in 40 percent of cases that were committed to the Crown Court. This average figure masked a wide variation between Crown Court areas with magistrates responsible for 64 percent of either way cases reaching one court and 21 percent in another. Subsequent research suggested that magistrates were increasingly responsible for the majority of cases committed to the Crown Court. Compare the rates of Riley and Vennard to those of Hedderman and Moxon:

Of the 2,416 defendants in the Crown Court sample on whom such information was available, 41 per cent (980) had elected Crown Court trial and 59 per cent (1,436) had been sent for trial because the magistrates declined jurisdiction (1992: 7).²⁴

²⁴ Data was not available on 540 cases due to a lack of systematic recording in one Crown Court centre.

In addressing why magistrates decline jurisdiction it is necessary to understand the role of the prosecution. All research studies in this area have reported widespread agreement between the prosecutor's recommendation and the bench's decision. Riley and Vennard (1988) noted that the bench agreed with the prosecution in 96 percent of cases, Hedderman and Moxon (1992), without quoting any figures, also reported agreement between bench and prosecution, while Herbert (2003) noted that in a sample of 123 mode of trial hearings, a lay bench disagreed with the prosecutor (when unchallenged by the defence) in only one case. Stipendiary magistrates disagreed with the prosecutor in two out of 40 cases.²⁵

Given this degree of conformity, understanding the prosecutor's recommendation may offer an insight into magistrates' decision making practices. However, the evidence is inconclusive. Riley and Vennard simply referred to the Code for Crown Prosecutors and how this guided decisions that "were closely linked to their assessments of offence seriousness" (1988: 11). Hedderman and Moxon provided an analysis of interviews conducted with prosecutors and these indicated guidelines and principles that helped to structure the decision making process. In addition to the bland statement that prosecutors were guided by the Code for Crown Prosecutors, the report outlined some rules of thumb. For instance, in some courts all domestic burglaries would be sent to the Crown Court. For other property offences, if the value of the goods taken was over

²⁵ All three studies suggested different reasons for this agreement. Herbert suggested that the bench simply accepted the prosecutor's recommendation. Riley and Vennard suggested a number of reasons; the prosecution outlined the version of events, both applied similar criteria and prosecutors were engaged with the local culture. Hedderman and Moxon also pointed to a local culture.

£2,000, or if the offence was committed in breach of trust, the prosecutor would recommend the bench decline jurisdiction. The report also listed specific case factors with the eventual decision on venue for the cases that contained these factors. It is here that we see a problem; the list of factors in this table in no way enabled the reader to analyse possible interactions between different factors. This is especially true if a case involved one factor that suggested Crown Court trial while another suggested magistrates' court trial. Hedderman and Moxon reported that as a general rule, in property offences where the value of the property exceeded £2,000, the prosecution would recommend that the bench decline jurisdiction. Given that they reported that the decision of a bench and the recommendation of the prosecutor usually correlated, we could expect this general rule to be converted into practice. However, out of 42 cases with an allegation that a property offence was committed where the value of the property exceeded £2,000, the magistrates' declined jurisdiction on 29 occasions. The case remained in the magistrates' court on two occasions and the defendant elected Crown Court trial in a further 11 cases. Therefore, out of the 42 cases mentioned, the general rule was not applied in 13 cases. In other words, the intricacies of the decision making process had not been adequately explored in the report; there was no explanation as to why these 13 cases did not conform to the general rule that was outlined elsewhere.

The statistics above make it clear that defendants are less responsible for cases going to the Crown Court. Of those who do choose Crown Court, most do so because of a perceived problem with the quality of justice in magistrates' courts. A succession of studies have shown why defendants elect. Bottoms and McClean

(1976) reported that defendants believed they had a better chance of acquittal in the Crown Court and would receive a fairer trial. The convicted defendants interviewed by Hedderman and Moxon (1992) noted a better prospect of acquittal, a belief that magistrates were pro-police, increased disclosure, and a greater likelihood of receiving bail as reasons for electing. 28 percent of their sample also wanted to delay proceedings while 24 percent wanted to serve part of their sentence on remand. Riley and Vennard (1998), when interviewing defence solicitors, reported a similar list of reasons. Judges were regarded as better qualified while magistrates were said to favour the prosecution. Finally, the research commissioned by the James Committee (Home Office and Lord Chancellor's Office, 1975; Appendix C) drew similar conclusions.²⁶

2.5.2 Case outcome in the Crown Court

The research suggests that not all cases committed to the Crown Court need necessarily be sent there. Hedderman and Moxon collected information on 2,273 cases in the magistrates' court and 2,956 cases in the Crown Court. In order to glean further information on this sample, 666 defendants were selected for interview.²⁷ Having regard to the disappointing response rate, Hedderman and Moxon reported that 73 percent of the 130 defendants interviewed who had been

²⁶ At the time the Criminal Law 1976 progressed through Parliament, doubt was cast on whether a defendant did have greater prospect of acquittal in the magistrates' court (26 January, H.L. Debs., Vol. 379, Cols., 601-602). These figures were shown to be unreliable (Vennard, 1981) while later evidence supports the initial view. Vennard (1982; 1985), when controlling for evidential case features, suggested that venue has a bearing on conviction with a greater chance of acquittal in the Crown Court. Hedderman and Moxon also reported greater conviction rates in the magistrates' court.

²⁷ The report stated that only the most recent cases would be suitable for interview due to anticipated problems in contacting defendants.

dealt with at the Crown Court would have consented to summary trial.²⁸ Riley and Vennard examined a sample of 1,285 cases from court records and they obtained an interview in 909 cases. In 457 they interviewed both the prosecutor and the defence solicitor and in a further 65 they interviewed the defence solicitor only. They noted that “about two-fifths (24) of defendants (whose venue preferences were known) would have consented to summary trial if they had been given the option” (Riley and Vennard, 1988: 22). This figure must be treated with caution. Using the rough figure quoted of two-fifths it can be estimated that Riley and Vennard were aware of the preferences of defendants in around 60 cases. Defence solicitors were interviewed in 522 cases out of a sample of 1,285. What is more, Riley and Vennard reported that these 1,285 cases represented around 70 percent of the total number of either way cases processed in the sample courts during the research period. If it is also considered that the statements on the defendant’s wishes did not come from the defendant, but from the defence solicitor, it is difficult to know what weight to place upon these figures.²⁹

Even if it could be shown that a large number of defendants would consent to summary trial, the decision to decline jurisdiction is nevertheless appropriate if Crown Court trial is merited on the facts. However, Riley and Vennard noted *Criminal Statistics* indicated 55 percent of all convictions for either way offences in the Crown Court resulted in sentences within the powers of the magistrates’ court. Hedderman and Moxon were more specific on this point: they noted that

²⁸ 282 Defendants (42 percent) were interviewed.

²⁹ However, in an earlier study Bottoms and McClean (1976) reported that 25 percent of defendants would have consented to summary trial in their cases where magistrates declined jurisdiction.

of the 1,436 sentenced cases that were sent to the Crown Court on the direction of the magistrates, 52 percent of defendants received immediate custody. In other words, there were at least 48 percent of defendants who received sentences within the powers of the magistrates' courts. We can add those who received sentences of less than six months. Flood-Page & Mackie (1998), in a study of sentencing practices in the magistrates' and Crown Courts, have noted how overall, 62 percent of defendants in their study committed for sentence received a sentence within the powers of the magistrates' court.

Both reports gave reasons as to why this may well have been the case. Riley and Vennard suggested that magistrates might have declined jurisdiction for reasons that were not related to the likely sentence, such as when a co-defendant elected Crown Court trial. Similarly, the Crown Court may have been aware of mitigation that could not be raised at the mode of trial hearing. Hedderman and Moxon noted how the mode of trial decision was made in the absence of information on previous convictions and mitigating circumstances; both influential in the sentencing process. Additionally, the defendant may have pleaded guilty to a lesser offence that warranted a sentence within the range of magistrates' powers. Hedderman and Moxon specifically questioned the information that was available to magistrates and suggested this as a possible reason for cases being sent to the Crown Court that subsequently received a sentence within the powers of the magistrates' court.

Additionally, evidence exists that defendants elect Crown Court trial to secure what is perceived to be a better standard of justice, only for the defendant to

subsequently plead guilty and therefore fail to challenge the prosecution's case. Riley and Vennard (1988) reported that of the 244 defendants who elected trial, 74 percent (180) eventually pleaded guilty to all charges. Hedderman and Moxon (1992) noted that of those defendants who elected, 70 percent pleaded guilty to all charges while a further 14 percent offered mixed pleas.³⁰ Contrast with the research commissioned for the James Committee (Home Office and Lord Chancellor's Office, 1975) that suggested of the 166 defendants who elected, 69 percent pleaded not guilty to all charges with 85 percent initially intending to plead not guilty.

At first glance, it may seem a little counterintuitive for a defendant to elect Crown Court trial, in the belief that it offers a better chance of acquittal, only to subsequently plead guilty. Hedderman and Moxon (1992) explored the reasons for the existence of this paradox. Just over a quarter (27 percent) always intended to plead guilty from the outset because they expected a lighter sentence or a fairer hearing. 51 percent of those who changed their plea stated that they did so because charges were dropped, while 22 percent, often on the basis of legal advice, thought that to enter a not guilty plea would be futile. Riley and Vennard reported that 20 percent of defendants who elected intended to plead guilty at the time of election, whereas 74 percent of those who elected pleaded guilty. Similar reasons were offered for these new pleas: some defendants changed pleas due to lawyer's advice, while others did so because of "a bargain with the prosecution" or "information about probable sentence" (1988; 20). Herbert (2003) commented

³⁰ It is important to reflect here that Hedderman and Moxon's sample concerned convicted defendants and so therefore excluded those defendants who elected Crown Court trial, pleaded not guilty, and were subsequently acquitted. Had they been included, a lower ratio of defendants electing Crown Court trial and pleading guilty would have been reported.

on the inadequacy of advanced disclosure as received by the defence and on the propensity for charges to be amended after plea has been initially entered.

2.5.3 Restricting Crown Court trial

Both Hedderman and Moxon (1992) and Riley and Vennard (1988) suggested strategies for reducing the number of either way cases committed to the Crown Court. Both were clear in their belief that case outcomes did not justify Crown Court trial with its associated expense.

Hedderman and Moxon (1992) suggested, in cases where the defendant elected Crown Court trial and was subsequently convicted, the Crown Court was five times more likely to use custody and sentences were about four times longer. Using a multivariate statistic analysis to account for case factors, the choice of trial venue was found to be the most influential in any decision to impose custody. After allowing for such factors, they concluded that in like for like cases custody was used three times as often and sentences were two and a half times longer; an aggregate difference that suggested the Crown Court imposed custody at more than seven times the rate used by magistrates.³¹ Those defendants who chose Crown Court trial initially intending to plead not guilty but subsequently changing their plea were exposing themselves to the possibility of a custodial

³¹ Criticism can be made of Hedderman and Moxon's use of multivariate analysis. In their appendix, they noted the factors used to control for the importance of venue; these being, "convicted of more than one offence, having one or more previous convictions, having previously served a custodial sentence, being in breach of a court order, being remanded in custody, the nature of the principle offence, the offender's sex, the amount stolen in property cases, final plea, the availability of a social inquiry report, being under 21 year of age and having codefendants" (1992: 43). In contrast, Hood utilised over 70 case variables when examining the impact of race on sentencing (1992: Appendix 2). It could well be that in restricting the variables accounted for, Hedderman and Moxon have omitted important variables that impacted upon the custody decision, thereby weakening their conclusion.

sentence and for a longer period than that likely to be imposed in the magistrates' court. Defendants were therefore playing a form of roulette when electing Crown Court trial, whereby they gambled the possibility of a lesser sentence for an increased prospect of acquittal. However, as so many subsequently pleaded guilty, they lost the benefit yet still paid the price.

Both Hedderman and Moxon (1992) and Riley and Vennard (1988) referred to efficiency and economy as reasons for the adoption of strategies that reduce the workload of the Crown Court. Riley and Vennard noted the higher cost of Crown Court trials: the increased use of custody in the Crown Court significantly inflated the prison population thereby increasing the costs of that system; the large numbers of cases committed to the Crown Court increased delays that increased the numbers held on remand; and legal aid costs more in the Crown Court. Hedderman and Moxon provided detailed costs for 1988/9: a trial in the magistrates' court cost £295 compared to £3,100 in the Crown Court; prosecution costs were £50 compared to £460; defendants in the Crown Court were more likely to have a social inquiry report produced at a cost of £210 per defendant. They also noted that legal aid costs were higher in the Crown Court, and finally they reported that the largest cost differential was produced by differential sentencing that resulted in higher costs for the prison population.³² Given all the arguments referred to, Hedderman and Moxon were unambiguous in their belief that as things stood, Crown Court trial was a costly business that was not being used appropriately. They noted that public confidence in the

³² Recent evidence suggests that magistrates have increased their use of imprisonment. For instance, the Halliday report noted that custodial sentencing for adults in the magistrates' court increased by 191 percent between 1989 and 1999, from 18,200 to 53,000 adults given custodial sentences (Home Office, 2001*b*).

system was important and that such confidence was engendered by jury trial. However, they suggested that the perceived benefit of a higher acquittal rate in the Crown Court was not being utilised when defendants pleaded guilty. They concluded that:

the high cost of Crown Court trial, both in terms of direct costs and the indirect costs of more severe sentences and a higher remand population, seems to offer few tangible benefits, least of all for the defendants (1992: 41).

Bottoms and McClean suggested the task of administrators was one of balancing arguments on cost and efficiency with the rights of defendants. However, they were much more unambiguous in their justification of jury trial, not only as a symbolic effigy utilised to rally public confidence in the criminal justice system, but also as an authentic right of the defendant in the criminal justice system:

it is perfectly possible to argue that, as in many other legal contexts, the demands of adequate justice are opposed to those of economy and administration. On this view, everyone pleading not guilty is entitled to a judgment by his peers, the twelve good men and true of the English jury, the bulwark of liberty. On this view, trial by the magistrates is a form of second-class proceedings (Bottoms and McClean, 1976: 177-178).

These reports set the scene for the subsequent debates as well as reflecting what had gone before. They are part of the wider agenda of the search for a modern and efficient criminal justice system that respects the long and cherished traditions of its institutions.

2.6 The growth of summary jurisdiction: Reviews, reports and legislation

The decrease in the Crown Court's workload over the last 15 or so years, examined above, is a continuation of a long-term redistribution of business from the higher to the lower criminal courts. This prolonged shift suggests a reorganisation of the court system rather than simple fluctuations in the distribution of cases within that system. However, jury trial continues to be viewed as a bulwark of liberty; a right to be enjoyed by every citizen; the jewel in the crown of the criminal justice process; the ideological support that legitimises that process. The reality is that Crown Court trial is the exception rather than the rule (Darbyshire, 1997*b*).³³

This has a long history; the first landmark on this road occurred in 1847. Pre this date, choice of trial venue was straightforward: indictable offences were tried before a jury at Assizes or Quarter Sessions and non-indictable offences were heard before Justices of the Peace (Jackson, 1937).³⁴ The 1847 Act introduced summary trial for larceny if the defendant was under the age of 14, the Justices thought this appropriate, and the parents of the child consented.³⁵ More reforms of a similar ilk followed: the Administration of Criminal Justice Act 1855 extended the procedure to larceny of less than five shillings for adults; the Summary Jurisdiction Act 1897 lifted the five shillings threshold to forty shillings; in 1899 another Summary Jurisdiction Act provided for malicious

³³ Not only do most cases remain in the magistrates' court, but of those that are committed to the Crown Court a plea of guilty is the norm, thereby dispensing with the need for a trial. In 2001, 62 percent of all defendants pleaded guilty in the Crown Court (Home Office, 2002*a*).

³⁴ Assizes and Quarter Sessions were replaced by the Crown Court as a result of the Courts Act 1971, after a recommendation to this effect by the Royal Commission on Assizes and Quarter Sessions (1969).

³⁵ An Act for the more speedy Trial and Punishment of Juvenile Offenders, 10 and 11 Vict. c. 82.

damage to be tried by Justices of the Peace with a corresponding threshold of forty shillings; and finally in 1915 this forty shillings boundary was raised to twenty pounds by the Criminal Justice Administration Act. These reforms tinkered at the margins; 1925 saw the first major extension of summary jurisdiction for indictable offences (Thomas, 1972). Among the offences to be reclassified to allow summary trial by the Criminal Justice Act 1925 were; attempted suicide, malicious damage, malicious wounding, assault occasioning actual bodily harm, more larceny offences from the 1916 Larceny Act and certain forgery offences.

These early reforms were explained and justified as reducing delay and saving resources. The preamble to the 1847 Act stated that the purpose of the legislation was to “ensure the more speedy trial of juvenile offenders” while the long title to the 1855 legislation was “an Act for diminishing expense and delay in the administration of criminal justice” (Home Office and Lord Chancellor’s Office, 1975: 8).³⁶ Not only did these reforms reduce the workload of Quarter Sessions and Assizes, they were so successful that in a short space of time it soon became doubted if they could ever be reversed without placing an unbearable burden on the workload of the higher courts (Jackson, 1937). Piecemeal reform continued in 1962 with the Criminal Justice Administration Act that allowed for summary trial for indictable offences such as indecent assault, child abandonment and concealment of birth.

³⁶ The debates on the 1855 Act in Parliament centred upon the competence of magistrates to hear these cases, while recognising that costs and delays were growing. In many respects, these reflect the concerns expressed recently on the attempts to restrict trial by jury. For the debates on the 1855 Act see: 26 February 1855, H.L. Debs., Third Series, Vol. 136, Cols. 1871-1880; 27 February 1855, H.L. Debs., Third Series, Vol. 136, Cols. 1958-1961.

While summary jurisdiction was being extended for existing offences, newly created offences allowed for summary trial or trial on indictment, further increasing the range of offences with a choice as to venue. Additionally, defendants received a right to jury trial for summary offences where the maximum sentence exceeded three months.³⁷ The result of all this activity was a complex classification of criminal offences in urgent need of restructuring.³⁸

With this in mind, the James Committee was asked to:

consider within the framework of the existing court structure what should be the distribution of criminal business between the Crown Court and magistrates' courts; and what changes in law and practice are desirable to that end (Home Office and Lord Chancellor's Office, 1975: 128).

2.6.1 The report of the James Committee

A conflict between principle and economy lay at the heart of the perceived problem. Commentators thought the review to be little more than an exercise in reducing the workload of the Crown Court (Griew, 1977; Scott and Latham, 1976). The Home Secretary stated that he was conscious of the need to reduce the workload of the Crown Court, while protecting the interests of defendants (Home Office and Lord Chancellor's Office, 1975). In interpreting its terms of reference the Committee was unambiguous in its belief that they did not restrict the Committee to simply searching for means to reduce the Crown Court's workload:

³⁷ Summary Jurisdiction Act 1879, section 17. This was replaced by section 25 of the Magistrates' Court Act 1952 with the right of election remaining.

³⁸ See section 2.2 above.

We have not interpreted our terms of reference as limited by the wording of the Question giving rise to them. We have not regarded as our main objective the finding of a means of relieving the Crown Court of work. We have approached the issues from a standpoint of principle (Home Office and Lord Chancellor's Office, 1975: 3).

Nevertheless, the Committee enquired into delay and economy: comparative costs between trial venues were examined; concern about the Crown Court's workload was expressed; and the lack of delay in magistrates' courts' proceedings was noted. The report concluded that if the workload of the Crown Court continued to increase, this would have necessitated a large scale increase in court accommodation, staff and judges. This was seen as unlikely given the severe restraints on the Court Service's finances. The Committee therefore asked the question, "whether the interests of society can be served fairly and efficiently without some redistribution of work" (Home Office and Lord Chancellor's Office, 1975: 15). The Committee considered options with differential impacts upon the Crown Court's workload. One suggested removing the defendant's right to elect jury trial and leaving the decision either with the magistrates or the prosecution. The second was a reclassification of offences from indictable to the categories now known as either way or summary. The Committee observed that the choice of trial venue could not be given to the prosecutor (as was the position in Scotland) because of the very different nature of the Scottish Procurator Fiscal.³⁹ On the defendant's right to elect, the Committee noted the unpredictability inherent in any exercise of that choice but considered nevertheless that the right should remain. The claim that the exercise of the right

³⁹ At the time, the police were responsible for the prosecution of offenders in England and Wales. Prosecutors did not therefore share the independence of the Procurator Fiscal.

of election was abused was regarded as overstated and discarded as the evidence suggested that defendants valued jury trial.⁴⁰ The Committee fell short of recommending the removal of the right to elect and instead considered reclassification as an alternative. The classification of offences used today resulted from the deliberations of the Committee and they made a number of suggestions that removed an existing right to elect in some cases, and moved other indictable only offences into the new either way category. Finally, they recommended that any right of election for summary offences be removed. These proposals amounted to a major reclassification exercise: the indictable offences of burglary, unlawful sexual intercourse with a girl under 16, bigamy, and causing death by reckless or dangerous driving were to be placed in the either way category. Meanwhile, driving whilst intoxicated and careless or reckless driving were to lose the right of election.⁴¹ The Committee also recommended that low value theft and criminal damage lose the right of election. There was one final recommendation; a removal of the presumption of Crown Court trial for either way offences, to be replaced by a neutral perspective.

The report expected that the proposals taken together would reduce the workload of the Crown Court by around 6,000 to 8,000 cases a year.⁴² This represented a reduction of around nine to 12 percent of cases committed to the Crown Court in 1974, and a substantial step towards the stated aim that the Crown Court should be reserved for the most serious two to three percent of all offences. These

⁴⁰ The Committee commissioned the Office of Population, Census and Surveys to research the views of defendants on the right of election. This was also a question addressed by Bottoms and McClean (1976) and they too found that defendants attached great importance to the right to elect jury trial.

⁴¹ This list is not exhaustive and simply gives a flavour of the extent of the recommendations.

⁴² The Committee stated that these figures were largely the result of guesswork.

costings were a substitute for any deliberation on the merits of summary justice. At no time did the Committee adequately address the supposed imbalance between the quality of justice in the magistrates' and Crown Court. There was no serious engagement with the belief, widespread among defendants and their counsel, that the defendant benefited from a more impartial tribunal in the Crown Court.

There is very little information available on which to compare the quality of justice dispensed by the two courts, and we do not attempt to express a concluded view on the matter (Home Office and Lord Chancellor's Office, 1975: 18).

The proposals of the committee were implemented in the Criminal Law Act 1977 with one major omission; the reclassification of low value theft. The Committee, acknowledging that a theft conviction could result in a substantial loss of reputation, nevertheless considered that when deciding venue "no distinction should be drawn based upon the offender as opposed to the offence" (Home Office and Lord Chancellor's Office, 1975: 38). In the face of public hostility, the relevant clause was removed from the Bill. In a *Times* leader, the right to elect trial by jury was praised as a fundamental liberty of citizenship:

Trial by jury is deeply embedded in the national consciousness as a bulwark against tyranny, a safeguard for the individual against tyranny, a safeguard for the individual against oppression from the State and one of the distinguishing features of a free society. It must therefore not be restricted severely unless that is absolutely necessary for the fair and efficient functioning of the system of criminal justice.⁴³

⁴³ January 6 1977.

This general defence of trial by jury was a feature of the House of Lords debates on the Bill. The proposal to remove the right of election for low value theft was also criticised on the grounds that an allegation of dishonesty could have such a serious negative impact on a person's reputation, that the right to elect trial by jury should be preserved. Lord Brockway saw jury trial as 'a bulwark against tyranny':

I regard trial by jury as an absolutely fundamental instrument of a free society. The right to say when one is charged with an offence, that the decision as to whether one is guilty shall be by juries of ordinary men and women seems to me to be in the very fabric of a society of liberty.⁴⁴

Sensing defeat, the Lord Chancellor accepted an amendment that removed the proposal to reclassify low value theft, but not before stating that this would have serious implications for the Crown Court's workload.⁴⁵

2.6.2 The Criminal Justice Act 1988

The next reclassification occurred in 1988 with the Criminal Justice Act of that year. A Home Office Consultation Paper and a White Paper canvassed opinion on proposals suggesting reclassification to summary only the offences of common assault, driving whilst disqualified and taking a motor vehicle without consent (Home Office, 1986*a*; Home Office, 1986*b*). The consultation paper also suggested a statutory presumption that low value dishonest offences be tried

⁴⁴ 27 January 1977, HL Debs., Vol. 379, Col. 643.

⁴⁵ 27 January 1977, HL Debs., Vol. 379, Col. 703. The proposal to remove the right of election for low value criminal damage was not altered by the amendment.

summarily. The three offences above were all reclassified as summary offences and the threshold before criminal damage became an either way offence was raised to £2,000. No effort was made to implement the proposed presumption in relation to dishonesty offences. The justification for this reclassification concerned delay and economy. In the second reading debate in the House of Commons, the Home Secretary noted the benefit of the Bill:

The proposals will remove about 5,000 cases a year which is just over 5 per cent., from the Crown Courts and help to relieve a little of the formidable pressure.⁴⁶

2.6.3 The Royal Commission on Criminal Justice

As the establishment of the Royal Commission (1993) was announced on the day that the Birmingham Six were released, the widespread view that the Commission would propose sweeping changes to the criminal justice process, to avoid similar miscarriages of justice, was to be expected (Field and Thomas, 1994). However, the Report of the Commission has been widely condemned as contributing to a climate whereby criminal justice policy is dominated by ‘law and order’ and ‘tough talking’ politics (Belloni and Hodgson, 2000; McConville and Bridges, 1994). When the Commission examined mode of trial, it was heavily influenced by the research findings outlined above.⁴⁷ These observations were mobilised to recommend the defendant lose their right to elect despite the problematic nature of the research. There was no acknowledgement that the vast majority of either way cases were dealt with in the magistrates’ courts. There was

⁴⁶ 27 November 1986, HC Debs., Vol. 106, Cols. 469-470.

⁴⁷ See section 2.5

no inquiry as to the reasons for sentences in the Crown Court for either way offences being within the powers of the magistrates. There was no recognition that the work of Hedderman and Moxon (1992), relied upon extensively by the Commission, related to *convicted* defendants, and therefore misrepresented the actual numbers who elected and then pleaded guilty (Bridges, 1994). Finally, there was no appreciation that magistrates send more cases to the Crown Court compared to elections (Ashworth, 1993).

The Commission recommended the removal of the defendant's right to elect jury trial in either way cases. The Commission proposed that the decision be made by agreement between the defence and prosecution and if no agreement could be reached, the magistrates would be the final arbiters in the process. The proposal was made without any in-depth discussion of the merits of the respective trial venues and instead was largely based upon cost considerations (Belloni and Hodgson, 2000; Field and Thomas 1994). The Commission acknowledged that defendants are more likely to be acquitted in the Crown Court, but responded by asserting that "[m]agistrates' courts conduct over 93% of all criminal cases and should be trusted to try cases fairly" (Royal Commission on Criminal Justice, 1993: 88).

A 1995 consultation paper (Home Office, 1995*b*) sought views on implementing the recommendations of the Royal Commission, reclassifying low value theft and other offences and on the possibility that the defendant be required to enter a plea before any decision on venue be addressed. The Government implemented plea

before venue, while the proposal to remove the right of election met fierce resistance.

2.6.4 Plea before venue

This procedure was enacted in the Criminal Procedure and Investigations Act 1996; the defendant is expected to indicate a plea before the venue decision is made. This reform was expected to reduce the number of cases that were committed to the Crown Court; it was hoped that magistrates would be more likely to accept jurisdiction after a guilty plea, on the basis that a sentencing discount could be considered⁴⁸ and defendants would no longer be able to elect Crown Court trial after a guilty plea. Although defendants could have bypassed the reform by pleading not guilty with an intention to change plea (Redmayne, 1996) the statistics suggest that this has not occurred. As the sentencing discount is maximised by an early guilty plea, this acts as a disincentive to changing pleas. Although there may have been a reduction in committals for trial there has been an increase in committals for sentence, suggesting a change in the status of cases that are committed to the Crown Court (Bridges, 1999).

2.6.5 The Narey Report

The Narey Report, although primarily concerned with delay, constituted another contribution to the mode of trial debate (Home Office, 1997*b*). The author was asked to report on delays within the criminal justice process and as the workload

⁴⁸ Section 48(1) of the Criminal Justice and Public Order Act 1994 places a duty on a sentencing court to indicate if it reduces the sentence due to a guilty plea.

of the Crown Court was seen to exacerbate the problem, the distribution of criminal business found its way onto the agenda. Narey recommended that the defence lose the right to elect trial by jury, on the grounds that it was subject to abuse and was not cost effective. The report rehearsed many of the arguments analysed above and made a number of assertions that failed sufficiently to take account of available evidence. Again, Hedderman and Moxon (1992) were used without an appreciation that they examined *convicted* defendants and therefore overestimated the numbers of defendants who elect jury trial but subsequently plead guilty. The evidence did not support the statements in the report that defendants elect jury trial to delay proceedings.⁴⁹ Nevertheless, the proposal to give the bench the final decision on venue was aired for consultation by the New Labour Administration with a Bill finally placed before Parliament (Home Office, 1998a).

2.6.6 The Mode of Trial Bills

In a press release that coincided with the publication of the Criminal Justice (Mode of Trial) Bill, Jack Straw, then Home Secretary, announced that the main purpose of the Bill was to remove the right of election in either way cases. The justification for this proposal was to reduce costs and delay:

Too many defendants have been working the system, demanding Crown Court trial purely to delay proceedings. Not only does this cause suffering and distress to victims

⁴⁹ This was also rejected by the James Committee (Home Office and Lord Chancellor's Office, 1975).

and witnesses, but it also costs the taxpayer a lot of money in extra court costs. We estimate that this Bill would save the taxpayer over £100 million.⁵⁰

The Explanatory Notes to the Bill suggested that it would reduce the number of Crown Court trials by around 12,000 a year, resulting in a net saving of about £105 million.

Clause 1 of the Bill proposed amending section 19 of the Magistrates' Court Act 1980 so that the court would make the decision on venue, after hearing representations from the defence and prosecution. The framework within the Bill also considered the issues, raised in the report of the James Committee, on the importance of Crown Court trial for those of previous good character charged with dishonesty offences. In addition to taking into account the "nature of the case", the court could also enquire, "whether the accused's livelihood would be substantially diminished" or "whether the accused's reputation would be seriously damaged as a result of conviction". In addressing the accused's reputation the court could be informed of any previous convictions. Finally, the Bill also created a right of appeal against the decision of the bench.

The Bill was introduced in the House of Lords and, on second reading, Lord Williams, the Attorney-General, introduced the debate and suggested that the proposals were needed for a number of different reasons.⁵¹ These shared a common concern with costs and delay, expressed through the notion that inappropriate cases were committed to the Crown Court, wasting time and

⁵⁰ 19 November 1999. Press release 363 of 1999.

⁵¹ For the second reading debate, see 2 December 1999, H.L. Debs., Vol. 340, Cols. 919-1004.

money. Many of the previously examined reasons for restricting Crown Court trial were raised and direct reliance was placed upon the reports of the Royal Commission and the Narey Review.⁵² Lord Williams also remarked upon Crown Court delays and praised the magistracy as being a voluntary representative body of the people. Although the Bill progressed to Committee, it was roundly savaged by a number of Lords.

The thrust of the criticisms of the proposals can be grouped into five categories. Firstly, the impact of the Bill on ethnic minority defendants was considered.⁵³ Secondly, the Bill was condemned for creating a two-tier system of justice as questions of reputation could be considered in determining venue. Thirdly, the arguments on cost and delay were said to be spurious. Fourthly, a number of Lords examined the failings identified in the literature and suggested that the problems lay elsewhere.⁵⁴ Finally, the proposals were seen as a fundamental attack on an important civil liberty; the right to trial by jury. It is on this last subject that the Lords rallied against the Bill. Many Lords waxed lyrical on the historic basis of jury trial; its democratic credentials; its role in encouraging civic responsibility and the exercise of civic duty; its potential to set aside oppressive laws; and its role in legitimising the criminal justice system. Moreover, if all of the other arguments put forward by the Government were suspect, this simply added to the view that the attack on jury trial was an unwarranted restriction of a fundamental right. The issue was one of principle as opposed to economy:

⁵² At Col. 923.

⁵³ See Bridges et. al. (2000) for a fuller exploration of this point. Particular emphasis was placed upon the representative nature of juries. A view roundly condemned by Darbyshire as being naïve at best; random selection does not necessarily lead to representative juries (1991).

⁵⁴ Improved charging practices, better advanced disclosure and a more thorough CPS review were said to provide better alternatives for keeping inappropriate cases out of the Crown Court.

the fact is that for the purposes of saving money this Government seeks to deprive defendants of their right to be tried by a fairer and more up-to-date system.⁵⁵

Even though the Lords read the Bill for a second time, in Committee the same arguments resurfaced and the Bill was defeated.⁵⁶ However, the Government vowed to re-introduce the Bill into the House of Commons and to make use of the Parliament Acts.

The Bill was reintroduced to Parliament; the Criminal Justice (Mode of Trial) (No. 2) Bill received its second reading on 7 March 2000.⁵⁷ To alleviate the fears expressed in the Lords on the first Bill, the Government removed references to the livelihood and reputation of the accused. Instead, the court was to decide venue on the basis of the circumstances of the alleged offence alone. In addition to this change in substance in the Bill, there was also a presentational change. Although figures now suggested savings in the region of £120 million a year, the Bill was justified not on grounds of cost, but as introducing the most appropriate procedure for determining venue. The right to elect was described by Jack Straw as “an antiquated and time-wasting procedure” and removing the right of election was part of a wider “programme to modernise the criminal justice system.”⁵⁸ Nevertheless, the Bill still received a rocky ride through the Commons, both at

⁵⁵ Lord Thomas of Gresford at Col. 934.

⁵⁶ For the Committee stage of the Bill in the House of Lords see 20 January 2000, H.L. Debs., Vol. 608, Cols. 1246-1298.

⁵⁷ H.C. Debs., Vol. 345, Cols. 886-980.

⁵⁸ At Col. 886. The same arguments about inappropriate elections and savings in time and money were still advanced. In the third reading debate Charles Clarke suggested that the Government published the figures on expected savings, not because they were important as a justification of the proposals, but because they were required by law to do so. See 25 July 2000, H.C. Debs., Vol. 354, Col. 999.

second and third reading.⁵⁹ In addition to the arguments advanced in the Lords, new objections were raised that concerned the inability of the bench to take into account reputation. It was stated that the Royal Commission introduced this as an important safeguard when suggesting abolition of the right of election. Not being able to elect when one's reputation was at stake was seen as intolerable. By this time, the question of mode of trial formed part of the brief of Lord Justice Auld who had yet to conclude; many asked why this reform was introduced before Auld reported.⁶⁰ The Bill, however, successfully progressed to the Lords where it failed to make it past second reading for the same reasons that it failed on the first occasion.⁶¹ In a reflection of the Commons debates, the inability of the bench to take reputation into account, even though this change was driven by the debates on the first Bill, led some Lords to withdraw their support for the measure. As in the Commons, many enquired into the appropriateness of requesting Lord Justice Auld to report and then legislating before he did so. Many felt justified in standing firm against the Commons on the basis that the Bill was not a manifesto commitment and it was frequently noted how the thrust of the Bill was opposed by New Labour when in opposition. Nevertheless, the Government subsequently indicated that it intended to continue with the proposal to remove the right of election in either way cases.⁶²

⁵⁹ At third reading the Bill was subjected to a three line whip and a guillotine motion that attracted criticism from all sides of the House. For the debates at third reading see, 25 July 2000, H.C. Debs., Vol. 354, Cols. 938-1022.

⁶⁰ The conclusions of Lord Justice Auld will be reviewed in section 2.6.7.

⁶¹ 28 September 2000, H.L. Debs., Vol. 616, Cols. 961-1034.

⁶² See Charles Clark's answers to questions: 26 October 2000, H.C. Debs., Vol. 355, Col. 212 and 5 March 2001, H.C. Debs., Vol. 364, Col. 36.

2.6.7 The Auld Review

Lord Justice Auld was requested to undertake a wholesale review of the criminal courts, with terms of reference directing an inquiry into “the practices and procedures of the criminal courts at every level” (Auld, 2001: 1). As part of the review, Auld addressed mode of trial and the defendant’s right to elect. Auld recommended that the categorisation of offences remain and that his reforms should work within this system. However, he recommended the defendant lose the right to elect; in a manner reminiscent of the report of the Royal Commission and the Narey Review, Auld made the same observations on the right to elect. However, the report examined the evidence through sceptical lenses. The misreading of Hedderman and Moxon was noted and he looked at the reasons for elections where the defendant subsequently pleaded guilty. However, rather than suggest reforms that addressed these issues, Auld grasped the nettle and recommended the right of election be removed. For Auld, the issue was of determining the appropriate method of deciding venue, and as this was an objective decision in which the public had an interest, it should be made by a court. Auld was particularly scathing on those who suggested that the right of election was a historic and fundamental right of citizenship. Such views were:

over-emotive and legally and historically mistaken arguments exaggerating the status, longevity and extent of a defendant’s elective right to trial by jury (2001: 195).

This opinion is in some ways contradictory to what had gone before. Previously, Auld outlined the history of electing and how elections were created by the introduction of summary trial for indictable cases. Any description of this

movement towards summary trial illuminates the revisions to history performed by the pro-election camp. It is correct to state that pre 1847 a right to elect did not exist. However, that was because nearly all cases were heard in the higher courts and summary jurisdiction was limited. Therefore, although the right to elect is a relatively recent creation, jury trial itself has a much longer pedigree. To say that reliance on the historical longevity of jury trial is mistaken somewhat misses the point; the creation of venue choice was introduced to facilitate a reduction in the caseload of higher courts. This is the trend that pro-election campaigners are trying to resist; it is paradoxical that earlier reforms are used to justify further reform. This remains the case if one accepts Auld's view that the increase in summary jurisdiction has to be placed "in the context of the harsher criminal law and justice process of the day in which the trial process provided very few of the protections currently afforded to defendants" (2001: 197). In addition to removing the right to elect, Auld also recommended the option of committal for sentence be removed; Auld recognised that removing the right of election, while retaining the possibility of committal for sentence, was unfair in that the defendant would be denied jury trial while still subject to higher penalties in the Crown Court.

The proposed removal of this right to elect needs to be viewed in the context of other recommendations in the report. More specifically, the creation of a 'third tier' court; an intermediate tier between the magistrates' and Crown Court with a maximum penalty of two years' imprisonment. This court was to consist of a mixed panel of two lay magistrates and a District Judge (Magistrates' Courts). The benefit of this system was the combination of lay representation and judicial

experience acting as a collective (Sanders, 2001). Given the increased sentencing powers of this mixed tribunal, this would have resulted in a radical reduction in the Crown Court's workload as large numbers of cases would be sent to this intermediate tier. Perhaps conscious of the combined effects of these proposals, the Government chose not to implement this part of the Auld Review.⁶³ In fact, the Government failed to act on the proposal to remove the defendant's right to elect in the subsequent legislation.

2.6.8 The Criminal Justice Act 2003

While Lord Justice Auld was deliberating, but prior to reporting, the Government published a policy paper, *Criminal Justice: The Way Ahead* (Home Office, 2001a). While promising to give Lord Justice Auld's recommendations their full consideration, the Government did not wait for these on mode of trial. They proposed, to speed up justice for victims and witnesses, "to give the courts, rather than the defendant, the power to decide whether a triable either way case would be heard in the Crown Court" (2001a: 61).⁶⁴ In the White Paper *Justice for All*, the Government rehearsed the arguments examined above that suggested the right to elect be restricted (Home Office, 2002b). However, the Government acknowledged elections were a "small and diminishing proportion" of either way cases sent to the Crown Court and there were "issues of principle" inherent in the

⁶³ There are a number of possible reasons as to why the Government may have declined to implement these proposals. The Government may have suspected that an intermediate tribunal would provide insufficient safeguards (Jackson, 2002). Alternatively, given the failure of the two previous Criminal Justice (Mode of Trial) Bills, the Government may have considered that the proposals seen in the round may have given the impression of constituting a fundamental attack on trial by jury. Such a view is all the more likely when placed alongside proposals restricting jury trial in cases of serious fraud or when the defendant chose trial by judge alone.

⁶⁴ See section 2.5.

right of election (2002*b*: 73). As a result, the Government announced they would retain the defendant's right of election. However, other proposals aimed to address the concerns raised and thereby reduce the number of elections. It appeared the Labour administration heard the calls from the Lords and therefore proposed to tackle Crown Court delays through means other than removing the right to elect. Some remedies can be traced to the Lords who opposed the Criminal Justice (Mode of Trial) Bills. For instance, in order to deal with defendants who changed their pleas after electing, the Government suggested three proposals. Firstly, giving the responsibility for charging to the CPS and new CPS administrative arrangements would result in fewer instances of overcharging, and a correlating reduction in elections designed to prompt a fuller review. Secondly, a clearer system of graduated sentencing discounts for guilty pleas would reduce not guilty pleas where the defendant was guilty. As part of this process, the court would be able to give an indication of sentence before considering venue. This would encourage guilty pleas. Finally, the Government proposed abolishing committal for sentence so that if a defendant consented to summary trial this would restrict the sentence to the magistrates' maximum. In order for this to work effectively, and to facilitate informed decision making, the bench would be informed of previous convictions. In addition to these proposals, the Government also suggested an increase in magistrates' maximum sentence to one year, with an option to move to 18 months.⁶⁵ The recommendations in the White Paper were aimed at the specific complaints raised earlier, but rather than using the blunderbuss tactic of removing the right to elect, the proposals dealt with each specific point utilising bespoke solutions. However, the overall aim

⁶⁵ Evidence suggests that magistrates do not wish for this increased maximum penalty (Herbert, 2003).

was to reduce the Crown Court's workload thereby reducing delay and saving resources.

These proposals all found a place in the Bill that formed the Criminal Justice Act 2003. There are many indications that reveal the intentions behind this part of the Bill. The Government, in addressing the concerns of the Home Affairs Committee that the proposed increase in magistrates' sentencing powers would increase imprisonment, stated that:

the increase in magistrates' sentencing powers is closely tied in with the changes to allocation of offences between courts set out earlier in the Bill, both of which encourage magistrates to retain more cases (Home Office, 2003: 11).

A House of Commons research paper came to a similar conclusion on the aims of the Bill; "the Government envisages significant reductions in the number of cases going to the Crown Court and in 'the abuse of the right to elect for jury trial'" (Broadbridge, 2002).

Section 29 gives the CPS the responsibility for charging defendants. Section 154 increases the sentencing powers of magistrates to one years imprisonment; the proposal to allow the Home Secretary to increase this to 18 months was removed in the Lords.⁶⁶ Section 41 provides for the enactment of Schedule 3 that

⁶⁶ 8 October 2003, H.L. Debs., Vol. 653, Cols., 296-299. At third reading, the Lords also attempted to link the increased sentencing power to the introduction of custody plus (a new sentence introduced that is part custody, and part intensive supervision upon release). Baroness Scotland for the Government observed that there would be "anticipated benefits" from the increase in powers independent of custody plus (the ability of magistrates' to retain more cases) that justified rejecting the suggested amendment. (See 5 November 2003, H.L. Debs., Vol. 654, Cols., 824-828.) Similarly, Paul Goggins for the Government in the Commons, when addressing

implements many of the proposals examined above. Schedule 3 amends the Magistrates' Court Act 1980 in a number of significant ways. There is no alteration to the plea before venue procedure; the defendant must still indicate a plea and venue will only be considered in the event of a not guilty plea. If there is a plea of guilty, the court can sentence immediately, adjourn for reports or commit the defendant to the Crown Court for sentencing. If the court needs to consider venue, the defence and prosecution are allowed to make representations. Information on previous convictions will be available; this facilitates the removal of the option of committal for sentence. Armed with this information, and having "regard to any allocation guidelines", the bench must decide upon venue. If the bench decides that the allegations are more suitable for the Crown Court, that is the end of the matter. However, if they accept jurisdiction, then the defendant is asked to consent to summary trial. It is at this point that two devices have been introduced to reduce elections. Firstly, the defendant is informed that if he does consent to summary trial he may be committed to the Crown Court for sentence in limited situations.⁶⁷ Secondly, the defendant is able to request an indication of sentence. The court *may* give an indication, but only addressed as to whether or not they would impose custody. The defendant is then asked if she would like to reconsider her plea. This indication would only be binding on any future sentencing court if the defendant changed her plea. If the defendant maintains the not guilty plea, then she either accepts summary jurisdiction or elects Crown

this suggested Lords amendment, noted the "benefits to the administration of justice" that would pertain from dealing with more cases in the magistrates' court. The Commons rejected this amendment. (See 18 November 2003, H.C. Debs., Vol. 413, Cols., 724-732.) When the Bill was returned to the Lords, they did not insist on this amendment. (19 November 2003, H.L. Debs., Vol. 654, Cols., 2005-2007.)

⁶⁷ The Schedule has not fully removed the option for committal for sentence as suggested in the White Paper. Elsewhere, the Act provides for extended sentences for dangerous violent and sex offenders and, if the defendant qualifies for such an extended sentence, the power to commit for sentence remains.

Court trial. If the defendant changes her plea then the court proceeds to sentencing accepting the indication of plea as a plea of guilty.

These proposals received little opposition as the Bill progressed through Parliament. David Blunkett, the Home Secretary, when introducing the second reading debate made clear, if this were needed, these proposals were aimed at reducing delay and saving resources.⁶⁸ Although the aims were the same, the means had changed and as a result, relatively little of the debate was addressed to these clauses in the Bill. Instead, the Government's opponents rounded on what was regarded as another assault upon jury trial; the proposals to introduce trial by judge alone in a number of situations: if the defendant requested, if there was, or a threat of, jury intimidation and in long and complex cases. Once more, MPs waxed lyrical on the merits of jury trial and its place within the criminal justice system. However, little of this was aimed at the mode of trial proposals as the defendant retained a right of election, even though the Bill would place maximum pressure on defendants to dissuade them from exercising that right.⁶⁹ The mode of trial proposals easily passed the committee stage and were again infrequently addressed at third reading.⁷⁰ In the Lords, many Lords at second reading again felt the need to defend jury trial, but this defence was aimed at the proposals for trial by judge alone; little was said on the mode of trial proposals.⁷¹ The Lords did defeat the proposals for trial by judge alone in Committee,

⁶⁸ For the second reading debate see: 4 December 2002, H.C. Debs., Vol. 395, Cols. 912-1014.

⁶⁹ There were the occasional dissenters on these proposals due to the effect that they would have on the number of jury trials. For instance, see Mr. Kidney who, in the second reading debate, described his observations as a "footnote" (at Col. 970).

⁷⁰ For the relevant proceedings of the Standing Committee see: 25 February 2003, HCSCB, Cols. 1082-1098. For the third reading see: 19 May 2003, H. C. Debs., Vol. 405, Cols: 688-813 and 20 May 2003, H.C. Debs., Vol. 405, Cols. 865-983.

⁷¹ For the second reading debate see: 16 June 2003, H.L. Debs., Vol. 649, Cols. 558-654.

removing the relevant clauses from the Bill.⁷² The Government's insistence on these measures being adopted resulted in the Bill being sent back and forth between the Commons and Lords before a final compromise was accepted. When first returned to the Commons, the relevant clauses were reinserted into the Bill, with the availability of trial by judge alone in long and complex cases, restricted to serious fraud cases.⁷³ When the Bill was returned to the Lords on the next day, they rejected the Commons' reinstatement of the relevant clauses and removed them once again from the Bill.⁷⁴ Faced with the possibility of deadlock, and loss of the Bill as Parliament was about to be prorogued, the Government offered concessions. Clause 41, which offered the defendant a choice of trial by judge alone, was amended to allow judicial discretion as to whether the defendant's application would be accepted. Also, trial by judge alone for serious fraud cases would only be permissible with the consent of the Lord Chief Justice. The tests pertaining to whether or not trial by judge alone was permissible in cases of alleged, or threatened, jury tampering were also made more rigorous.⁷⁵ Before the Bill was considered again in the Lords, the Government attempted to broker a deal to ensure the passage of the Bill. Clause 41, pertaining to judge alone trials on the application of the defendant, was to be removed to ensure the enactment of clauses 43 and 45 on judge alone trials for cases of jury tampering. Clause 42 on serious fraud cases remained a stumbling block. However, the Government removed the amendments that would have enacted this compromise resulting in allegation and counter allegation as to who was to blame. The Lords therefore blocked the passage of the Bill once again by removing clauses 41 and 42, while

⁷² For the relevant parts of the Committee stage in the Lords see: 15 July 2003, H.L. Debs., Vol. 651, Cols. 768-823.

⁷³ 18 November 2003, H.C. Debs., Vol. 413, Cols., 648-688.

⁷⁴ 19 November 2003, H.L. Debs., Vol. 654, Cols., 1942-1972.

⁷⁵ 19 November 2003, H.C. Debs., Vol. 413, Cols., 876-903.

amending the clauses on jury tampering so as to make the tests even more restrictive.⁷⁶ Upon being returned to the Commons once again, the Government accepted the previous compromise and removed clause 41 from the Bill, securing clauses 43 and 45 on jury tampering. Clause 42 was amended so that adoption could only be effected upon affirmative resolution of both Houses of Parliament. In the meantime, the Government promised to investigate alternative approaches to dealing with cases of serious fraud.⁷⁷ The Lords accepted the compromise⁷⁸ and the Bill received Royal Assent that day.⁷⁹

2.7 Conclusions

Since the introduction of a category of offences that could be tried in different courts in 1847, there has been a gradual transformation in the workload of criminal courts with a prolonged and steady drift away from trial on indictment. Successive reviews and legislative reforms have justified this growth in summary jurisdiction on grounds of reducing cost and delay. The right of a defendant to elect Crown Court trial has come under close scrutiny and, although it appears safe for the time being, the reforms in the Criminal Justice Act 2003 will further dissuade defendants from exercising that right. All of this has taken place without any clear discussion as to the merits of summary jurisdiction, other than a vague appreciation that defendants usually believe that jury trial is fairer with an increased chance of acquittal. Even so, compared to the knowledge of

⁷⁶ 20 November 2003, H.L. Debs., Vol. 654, Cols., 2053-2066.

⁷⁷ 20 November 2003, H.C. Debs., Vol. 413, Cols., 1025-1034.

⁷⁸ 20 November 2003, H.L. Debs., Vol. 654, Cols., 2105-2110.

⁷⁹ 20 November 2003, H.C. Debs., Vol. 413, Col. 1037.

magistrates' practices, the research evidence relating to the defendant's actions appears to be voluminous.

CHAPTER THREE

MAGISTRATES

3.1 Introduction

Chapter 2 introduced the quality of justice in magistrates' courts as an issue intensely bound up with the mode of trial debate, yet inadequately addressed within that debate. Frequent note was made of the defendant's belief that magistrates' courts are an inferior venue (Bottoms and McClean, 1976; Home Office, 1986*b*; Hedderman and Moxon, 1992; Riley and Vennard, 1988). Defendant's distrust is reflected in a general belief among the public that magistrates are 'out of touch' and do a 'poor job' (Mattinson and Mirrlees-Black, 2000; Hough and Roberts, 1998), although this could result from a mistaken belief that magistrates use their sentencing powers leniently (Hough and Roberts, 1998).⁸⁰ The dearth of information about magistrates' justice in the mode of trial debates is symptomatic of the lack of research evidence. While the Auld Review (2001) lists an extensive bibliography of jury research there is no comparable list of research on magistrates' justice. Nevertheless, research on the magistracy exists and this Chapter assesses models of the magistracy, the recruitment of magistrates, the composition of the bench, the role of professional magistrates and the quality of justice in magistrates' courts.

⁸⁰ A survey reported in Morgan and Russell (2000) suggested that public confidence in the magistracy was not as low as that suggested in the British Crime Survey. 65 percent of respondents reported that they were either very confident or fairly confident in the ability of magistrates to do their job properly. Sanders (2001) showed a confused public perception of the magistracy with 60 percent of respondents to the survey acknowledging the lay status of the magistracy, yet 46 percent believing that magistrates were subjected to "full legal training" (2001: 16).

As explained in Chapter 1, this chapter links the examination of mode of trial conducted in Chapter 2 with the theoretical framework developed in Chapter 4. The research progressed from an initial intention to examine mode of trial decisions from an exclusive policy perspective to one whereby mode of trial decisions were to be situated within wider theories of social interaction. The focus of the research therefore shifted, and Chapters 2, 3 and 4 represent this shift. Initially, it was felt that the mode of trial decision would be best located within an understanding of magistrates' justice. However, the wider theoretical concerns that will be outlined in Chapter 4 moved the discussion on somewhat into social theories of interaction. Nevertheless, this chapter is still important as it helps to unearth a wider view decision making within the magistrates courts, although it is acknowledged that restrictions on space have limited the extent to which these issues can be pursued in further chapters. However, the shift in this chapter from examining the composition of the magistracy towards more a sophisticated understanding of magistrates' justice, assists in describing the development of the research and the linkages between the differing ideas within the thesis.

3.2 Appointment to the bench

The criteria for appointment to the bench are fully outlined in the Judicial Appointments Annual Report (Department for Constitutional Affairs, 2003a). The Lord Chancellor appoints magistrates after a recommendation from

Advisory Committees that are frequently supported by Sub-Committees.⁸¹ These Committees institute a two-stage interview process, with the first enquiring into suitability for appointment and the second examining ‘judicial aptitude’. In assessing suitability, candidates are required to display ‘six key qualities’: “good character, understanding and communication, social awareness, maturity and sound temperament, sound judgement, and commitment and reliability” (Lord Chancellor’s Department, 2002: 59). This process explores candidates’ attitudes on criminal justice issues. The second interview tests judicial aptitude through an examination of case studies that represent the staple diet of a magistrates’ workload. In recommending candidates for appointment, the Advisory Committee is:

to have regard to the number of vacancies and the need to ensure that the composition of the bench broadly reflects the community which it serves in terms of gender, ethnicity, geographical spread, occupation and political affiliation (Lord Chancellor’s Department, 2002: 60).

Advisory Committees also ensure that professional interests do not dominate any particular bench and that any profession constitutes at most 15 percent of any one bench (Home Affairs Committee, 1996). In other words, the Lord Chancellor aims to achieve a composition where the bench is a “microcosm of the local community within which it operates” (Skyrme, 1983: 67).

This selection procedure, privileging as it does a conception of the magistracy as a microcosm of the local community (Dignan and Wynne, 1997), has been

⁸¹ The Duchy of Lancaster has similar powers to appoint Justices with the Duchy.

shaped by two Royal Commissions: the Royal Commission on the Selection of Justices of the Peace (1910) and the Royal Commission on the Justices of the Peace (1948). The first Royal Commission was established by the Liberal Government in response to widespread dissatisfaction with the social composition of the magistracy, resulting from the switching of political allegiances by magistrates after the Home Rule Crisis (Burney, 1979; Skyrme, 1983; Vogler, 1990). This unease at the Conservative majority survived the removal of the property qualification in 1906 by the Liberal Administration (ibid). The first Royal Commission led to the installation of the Advisory Committee system and a desire to achieve a range of social views on the bench, especially those of the working classes. The first Committees were appointed in 1912 (Skyrme, 1983), although they did little to dispel the perception that the bench was predominantly a Conservative, middle-aged, middle-class, white, male⁸² institution (Vogler, 1990). The appointment procedures were therefore readdressed by the Royal Commission on Justices of the Peace (1948). This Commission recommended retention of the Advisory Committee system, while restating the principles expressed in the 1910 Commission. The problem was identified as one of over-reliance on established sources of recruitment such as political parties and “certain sections of the community” (1948: para. 72). The Commission recommended Advisory Committees have a limited membership of political appointees and their “paramount consideration [was] the person’s fitness for the discharge of judicial duties” (ibid: para. 84a).⁸³ While the Commission recommended political influence should have a limited role for the appointment

⁸² The prohibition on the appointment of women magistrates was removed in 1919.

⁸³ In a dissenting memorandum, Lord Merthyr, Mr. Stapleton Cotton and Mr. John Watson rejected political affiliation as a consideration for appointment to Advisory Committees due to the possibility of politics playing an unwarranted role in the appointments procedure.

of Advisory Committee members, it was praised as a method of ensuring that the bench represented a cross-section of the community. However, the Commission expressed concern with the practice of rejecting candidates on the basis of political viewpoints if such views were already well represented on the bench.

3.3 Models of the lay magistracy

While the composition of the magistracy may have serious implications for the public image of the criminal justice process (Baldwin, 1976), any claim that it also impacts upon the quality of justice in magistrates' courts must be taken seriously. The existence of the lay bench may well perform a number of interlinked functions such as contributing to a general sense of civic responsibility, involving lay participants in the administration of criminal justice, opening law to general scrutiny and restricting professional power (Seago et. al., 2000).⁸⁴ For our purposes however, a more useful starting point may well be the work of Dignan and Wynne that identified four possible models of the magistracy: magistrates as social elites; magistrates as a meritocracy; magistrates as a microcosm of the local community; and magistrates as representatives of their local communities (1997).

They expanded upon these models by examining alternative purposes of the magistracy, some of which have serious implications for the quality of justice in the magistrates' courts. The first purpose saw the magistracy as a "quasi-professional panel" of fact finders (ibid: 196). Dignan and Wynne asserted that

⁸⁴ All the while being relatively inexpensive. For a more general discussion on the benefits and pitfalls of lay participation in the criminal justice process with specific reference to the magistracy see Darbyshire (2002), Morgan and Russell (2000) and Sanders (2001).

this purpose presupposes that appointments be based upon merit to recruit the best qualified magistrates. The second purpose saw the magistracy as a judicial safeguard, an injection of lay common sense into the legal system. Dignan and Wynne viewed this role as similar to the role of the jury: lay participation necessitates keeping law simple and intelligible; it acts as a check against oppressive legislation; and it results in legal interpretation that draws upon everyday conceptions of the world. For Dignan and Wynne, this model necessitates a divergence of views on the bench and recruitment practices that enlist “ordinary people coming from all walks of life” (ibid: 196). The third function was the magistracy as a democratic safeguard. This exalts the local in magistrates’ courts and the diffusion of power from a “centralised system” into “the hands of local representatives” (ibid: 196). This necessitates recruitment practices going further than required for the ‘judicial safeguard’ argument as magistrates would need to be drawn from “not only the local community as a whole, but also of its constituent localities” (ibid: 196).

Each of these models has something to say, either expressly or by implication, on the composition of the bench and its relation to the judicial function of magistrates. Both the second and third functions call for a degree of widespread community involvement although to differing extents. If the magistracy is to act as a judicial or democratic safeguard against the worst excesses of an isolated and remote legal system, this necessitates a sufficiently broad spread of social views on the bench. As for the first function, Dignan and Wynne underestimate the degree to which a balanced bench is desirable for fact finding. Dignan and Wynne suggested fact finding is best achieved by a “quasi-professional panel of

suitable qualified people” (ibid: 196), whereas it may be that everyone is suitably qualified, as panels do not find facts out there but rather invest evidence with credibility (McConville et. al., 1994). More will be said on this later,⁸⁵ but for the time being it is sufficient to assert that whether or not evidence is viewed as reliable or coherent, and therefore accepted as the truth, is not a function of that evidence, but is instead a product of whether or not that evidence falls within the ‘perceptual set’ of the fact finder (King and May, 1985) or accords with narrative conventions as understood by the fact finder (Bennett and Feldman, 1981). A magistracy dominated by one social grouping may lead to shared world views that disregard alternative realities and affirm:

the idea that knowledge held by duly accredited experts is the only rational and sensible way of interpreting the world (Bankowski and Mungham, 1976a: 222).

If such a view is accepted, whatever model is seen as appropriate is inconsequential to the need to compose a bench that is representative of the community as a whole, regardless of any concern with the public image of the magistracy.

3.4 The composition of the magistracy

Numerous research studies have addressed the magistracy’s composition either as a topic with intrinsic interest or as incidental to further research. Most of this work has been bypassed by the availability of annual statistics for the magistracy as a whole in *Judicial Appointments Annual Reports* (Department for

⁸⁵ See section 3.6.2.

Constitutional Affairs, 2003*a*; Lord Chancellor's Department, 2002; Lord Chancellor's Department, 2001; Lord Chancellor's Department, 2000*a*; Lord Chancellor's Department, 1999).⁸⁶ The availability of this somewhat historical research does, however, facilitate an examination of changes in the composition of the magistracy and an evaluation of the extent to which successive Lord Chancellors have achieved their stated aim of 'balancing the bench'. Figures are available that examine the magistracy's composition utilising categories propagated by the Lord Chancellor and wider measures: politics, social class, age, ethnicity, gender, geographical spread and involvement in community activities. Additionally, some research reports have assessed the composition of Advisory Committees.

3.4.1 Advisory Committees

Members of Advisory Committees and Sub-Committees are appointed to oversee the recruitment of magistrates and recommend suitable candidates to the Lord Chancellor (or the Duchy of Lancaster) for appointment. As at June 2000, there were 92 Advisory Committees across England and Wales with a further 120 Sub-Committees (Lord Chancellor's Department, 2000*b*). Appointment to an Advisory Committee falls within the patronage of the Lord Chancellor after a recommendation from an appointments committee of the Advisory Committee. The Home Affairs Committee had recommended the election of Advisory Committee members (Home Affairs Committee, 1996), but this approach has

⁸⁶ It could be said that the figures are irrelevant as the magistracy functions as a system of 'repressive and ideological domination' regardless of its composition (Pearson, 1980: 79). However, as argued earlier, the composition of the magistracy has important implications for its functioning.

been rejected on the grounds that the Lord Chancellor needs to ensure a cross section of the community sit on Advisory Committees (Lord Chancellor's Department, 1996). The current arrangements have the potential for Committees to self reproduce with like minded candidates being appointed. The Lord Chancellor aims for a similar social balance of gender, ethnicity, geographical spread and age as desired in the magistracy as a whole (Lord Chancellor's Department, 1998*b*). The Department for Constitutional Affairs⁸⁷ does not produce statistics on the composition of Advisory Committees, although a number of different research studies have provided evidence of a significant social imbalance on Committees and Sub-Committees.

3.4.1.1 Politics

Political affiliation plays an important role in the composition of Advisory Committees; it is used as a surrogate measure of community representation to the extent that every Committee and Sub-Committee should have at least one representative from each political party (including Plaid Cymru in Wales) and one member who is not committed to any particular party (Lord Chancellor's Department, 1998*b*; Skyrme, 1983). The clear danger from this political influence on Advisory Committees is that appointments result from "sophisticated horsetrading" (Bartlett and Walker, 1978). Burney (1979) for instance, reported a heavy concentration of political figures on Committees and clearly warned against the dangers of trading off one political appointment for another.

⁸⁷ Or its predecessor, the Lord Chancellor's Department (LCD).

3.4.1.2 Age

From the little evidence available it is probably safe to assume that “grey power” dominates Advisory Committees (Darbyshire, 1997*a*). In Burney’s (1979) study for instance, a substantial majority of magistrates (40 percent) were over 60. Given that Advisory Committee members are usually senior magistrates, it is unsurprising that the age profile of Advisory Committees was skewed towards late middle age.

3.4.1.3 Gender

One third of Advisory Committee members in Burney’s sample were women, a ratio that reflected the gender composition of the bench at that time. As the bench has recently achieved a gender balance (Department for Constitutional Affairs, 2003*a*), it could well be that a similar balance now exists on Advisory Committees.

3.4.1.4 Ethnicity

King and May (1985), in a study of 35 Advisory and Sub-Committees, found 2 Asian and no Afro-Caribbean Committee members from a sample of 292. This finding paralleled that of Burney (1979).

3.4.1.5 Magistrates

The Lord Chancellor requires that at least one-third of the members of Advisory Committees and Sub-Committees should consist of “non-magistrates” (Lord Chancellor’s Department, 2000*b*). The evidence suggests magistrates numerically dominate Committees to a greater extent than envisaged by the Lord Chancellor. King and May (1985) noted that 91 percent of members in their sample were magistrates while Raine (1989) commented how in 1982, only 113 out of a total of 1,900 members of Committees across England and Wales were neither magistrates nor ex-magistrates. The Home Affairs Committee report (1996) suggested that around 80 percent of Committee members were serving magistrates. This predominance of magistrates on Committees raises serious issues for their recruitment. Magistrates are not necessarily the most appropriate people for recruitment processes, as they are usually not well versed in recruitment practices and human resource management issues (King and May, 1985). There is a danger that appointees will be selected from the usual sources, thereby giving credence to the allegation that the bench is self-perpetuating (Burney, 1979; Hood, 1972). King and May suggested that the preponderance of magistrates on Committees be removed to be replaced by members with either expertise in recruitment practices, or a knowledge of magistrates’ courts, such as probation officers, solicitors and police officers (1985).⁸⁸ Magistrates would retain a place on Committees although not to the same extent as is now the case. Although there is no guarantee that such wholesale reform would radically alter

⁸⁸ Since King and May reported, the Lord Chancellor requires all new appointments to Advisory and Sub-Committees to be trained in recruitment practices and equality and diversity issues (Lord Chancellor’s Department, 2000*b*).

the composition of the bench, it would help counter suggestions that the bench is a 'self-perpetuating oligarchy'.

3.4.1.6 Combining the evidence

An amalgamation of all these different attributes results in exceptionally unrepresentative Advisory Committees. The description of the Rochdale Advisory Committee by Bartlett and Walker succinctly elucidates the combined effect of the evidence:

Norman Woolfenden, aged 69, a Liberal, a Rotarian and a mason, magistrate since 1950, chairman of the bench and also chairman of the hospital management committee; Albert Golland, aged 65, a Conservative, a Rotarian and a mason, magistrate since 1952 and a local accountant; Derrick Walker, aged 56, leader of the Labour group, magistrate since 1963, self-employed (1978: 211).

Advisory Committees that consist of the great and the good increase the danger of recruiting from the same remote and closed social circles; the Committee described above is teeming with public service commitment, with a risk that Committee members expect the same from applicants, thereby restricting the available pool of potential appointees (Home Affairs Committee, 1996). Although the evidence is relatively old and selective, a tentative conclusion could be that successive Lord Chancellors have failed in their aim of constructing representative Committees.

3.4.2 The magistracy

Since the report of the first Royal Commission on the Selection of Justices of the Peace (1910), successive Lord Chancellors have declared an aim to achieve a social balance on the bench (Skyrme, 1983). The evidence suggests that previous Lord Chancellors failed in this aim and that current arrangements are far from satisfactory.

3.4.2.1 Politics

The stated aim of achieving a political balance on the bench is a controversial issue: the suggestion that Lord Chancellors aim for a political balance caused dissent in the Royal Commission on Justices of the Peace (1948) on the grounds that politics should have no part to play in the appointment of judicial positions. The use of political affiliation as a criteria for simulating community representation raises the possibility of political divisions on the bench (Burney, 1979), in addition to a problematic public presentation engendered by a bench dominated by political figures. Although Skyrme (1983) thought political balance was an issue that received disproportionate attention to its role in the appointment process, the Lord Chancellor has accepted that politics remains an active consideration for appointment, however much he regrets this (Lord Chancellor's Department, 2000*a*). The Lord Chancellor has consulted on whether political affiliation should remain a consideration that reflects social balance (Lord Chancellor's Department, 1998*b*) but "no suitable alternative was

found” (Lord Chancellor’s Department, 2000a).⁸⁹ At the time of writing, the Department for Constitutional Affairs is assessing the results of a pilot project that provided alternatives to political affiliation for measuring social balance, and work is continuing on the development of a viable scheme (Department for Constitutional Affairs, 2003a).

The evidence on political affiliation suggests a predominance of Conservative magistrates. Care must be taken to distinguish between those who express a political affiliation and those who are either members of political parties or act in a political capacity, usually as councillors. It is the large numbers of politically active magistrates that provide the greatest cause for concern, as these magistrates not only express a political preference, but show the strength of these views by acting on this preference.

A succession of different reports have noted a political imbalance in the magistracy and a preponderance of politically active magistrates. Hood (1972) and Henham (1990) commented on large numbers of party members sitting on the bench, while Hood (1972), Bond and Lemon (1979), Burney (1979), Skyrme (1983), Raine (1989), Henham (1990), Dignan and Wynne (1997) and the Home Affairs Select Committee (1996) have all reported a Conservative dominance on either individual benches or for the magistracy as a whole.

As a result of the computerisation of LCD records, the *Judicial Appointments Annual Report* now provides information on the political composition of the

⁸⁹ The Magistrates’ Association suggested political affiliation was a poor indicator of the social composition of the bench (Magistrates’ Association, 1998).

magistracy in addition to information on recent appointments (Lord Chancellor's Department, 2001). On 1 April 2003 there were 24,419 serving magistrates in England and Wales, excluding the Duchy of Lancaster. Of these, 34.4 percent were noted as having an affiliation with the Conservative party, 25.5 percent with the Labour party, 13.1 percent with the Liberal Democrats, 0.5 percent with Plaid Cymru, 6.1 percent declared affiliations with 'other political parties' and 20.4 percent were described as either uncommitted or not known (Department for Constitutional Affairs, 2003a). For the Duchy of Lancaster there were 3,925 magistrates in post and, of these, 26.1 percent supported the Conservative party, 28.2 percent the Labour party, 11.4 percent the Liberal Democrats and 34.3 percent were either uncommitted or their affiliation was not known (Lord Chancellor's Department, 2003a).

The evidence from the LCD statistics suggests that Conservative supporters do enjoy a disproportionate representation on the bench compared to their support in the electorate at large, but that support in no way compares to the proportions reported in some of the earlier research studies. Either the areas selected for study in these earlier reports were not representative of the magistracy at large, or the Lord Chancellor has gained some degree of success in realigning the political balance on the bench. The consistent theme of over-representation of Conservative supporters reported in the earlier studies, leads to a conclusion that the Lord Chancellor has indeed been successful in *reducing* the Conservative domination of the bench, although there remains a Conservative majority.

3.4.2.2 Social class

Historically, the magistracy was dominated by the landed gentry who vigorously defended their position against the “influx of commercial and industrial wealth” (Moir, 1969: 77). The abolition of the property qualification in 1906, and the reports of the two Royal Commissions in 1910 and 1948, evidenced an intention to widen the social base of the magistracy, yet it is doubtful to what extent these efforts have been successful. The evidence suggests that the magistracy has historically consisted of the privileged classes and efforts to reverse this have met with limited success. The reader should be aware of a number of problems with the evidence before it is examined. Evidence on the social composition of the magistracy has been available since the report of the Royal Commission on Justices of the Peace (1948) conducted a postal survey of all magistrates in 1947. In the history of research on magistrates, different classifications of social class and different methods of classifying the retired and women have been used. Even accounting for these problems of classification, the final figures produced may misrepresent the composition of the magistracy. Those with working class roots and “first hand knowledge of the conditions of life” of the working classes may, as a result of self-improvement, find themselves amongst the ranks of the professional and managerial classes (King and May, 1985: 106-7; Pearson, 1980). Those working men who are trade-unionists or receive a salary may also be classified in a category that does not adequately reflect their social status and the experience that they may bring to the bench (Burney, 1979; Skyrme, 1983). Nevertheless, the evidence is sufficiently strong to justify a conclusion that the bench is dominated by professional and managerial classes.

Many studies have commented on a dominance of managerial and professional occupations on the bench with a shortage of working class magistrates. These include the Royal Commission on Justices of the Peace (1948), Hood, 1972, Bartlett and Walker (1978), Pearson (1980), Skyrme (1983), King and May (1985), Raine (1989), Henham (1990), the Home Affairs Committee (1996), Dignan and Wynne (1997), Seago et. al. (1995) and Morgan and Russell (2000). Additionally, Baldwin examined the social class of magistrates on appointment and concluded that appointment practices were unlikely to alter this imbalance (Baldwin, 1976). A synopsis of Morgan and Russell's conclusions will give an adequate flavour of all research findings. After a postal survey of a sample of magistrates they reported that 40 percent had retired, 69 percent stated a managerial or professional role as current or former occupation, 12 percent had clerical jobs, three percent described themselves as skilled manual workers while five percent were unemployed. These overall figures masked differences in individual areas; Morgan and Russell concluded that managerial staff and professionals were over-represented on the bench "between two and four times" (2000: 16).

3.4.2.3 Age

Most of the evidence suggests that magistrates are on average a generation older than the clients of the criminal justice process (Darbyshire, 1997a). The Royal Commission on the Justices of the Peace (1948), Hood (1972), Bartlett and Walker (1978), Baldwin (1976), Henham (1990), Raine (1989), Dignan and

Wynne (1997), Seago et. al. (1995), the Home Affairs Select Committee (1996) and Morgan and Russell (2000) all verify this conclusion. The latest LCD figures stated that nationally (excluding the Duchy of Lancaster) a mere 3.8 percent of magistrates were under 40, 16.5 percent were between 40 and 49, 45 percent were between 50 and 59, and 34.7 percent were over 60. Within the Duchy of Lancaster the corresponding percentages are 3.2, 16, 45 and 35.80 (Department for Constitutional Affairs, 2003a).

If age is associated with wisdom and experience, then an ageing magistracy would be a valuable deposit of these skills. However, there is “no research which equates age with wisdom in the context of law-finding, judging character, understanding pre-sentence reports and sentencing” (Darbyshire, 1997a: 865).

3.4.2.4 Ethnicity

The historical data suggested a massive under-representation of ethnic minority communities on the magistracy, although the worst excesses have been somewhat reduced. By 1977 there had been 78 ethnic minority appointments to the bench, the first being a Mr. E. G. Irons in 1962 (Skyrme, 1983). Once again, all early studies reported an under-representation of ethnic minority magistrates (Bartlett and Walker, 1978; Raine, 1986; King and May, 1985). However, Dignan and Wynne (1997) reported a largely representative magistracy, as did Morgan and Russell (2000). Nevertheless, Morgan and Russell also noted that while some individual benches were balanced, other benches in areas with large ethnic minority populations suffered from an under-representation of ethnic

minority magistrates. As at 1 April 2003, 93.9 percent of all magistrates (excluding the Duchy of Lancaster) were white, 2.3 percent were black, 2.9 percent Asian and 0.9 percent were classified as other. Within the Duchy of Lancaster, 92.2 percent of magistrates were white, 1.2 percent black, 3.8 percent Asian, 0.6 percent were classified as other and data was not available for 2.2 percent of magistrates (Department for Constitutional Affairs, 2003a). Within England and Wales, 94 percent of the population is white, 2 percent is black, 3 percent is of Asian origin and 1 percent is constituted from other ethnic groupings (Morgan and Russell, 2000). The most recent figures on the composition of the magistracy therefore reflect the ethnic composition of the population at large. What is more, the continued appointment of ethnic minority magistrates is likely to secure their proportionate representation on the bench. Of all magistrates appointed during 2001-2002 (1,786), 1,638 (91.7 percent) were white, 42 were black (2.4 percent), 80 were Asian (4.5 percent) and 26 were classified as other (1.5 percent).

3.4.2.5 Gender

Gender is another area where the efforts of Advisory Committees and the Lord Chancellor to make the bench more representative of the wider community have been successful. Earlier research reports noted a gender imbalance within the magistracy that has been slowly removed. Baldwin (1976), Skyrme (1983), King and May (1985), Raine (1989), Henham (1990) and Dignan and Wynne (1997) all reported a gender imbalance. However, the report of the Home Affairs Committee (1996) quoted figures from the LCD that stated that, as at 31

December 1994, 47 percent of magistrates were women. Morgan and Russell (2000) reported similar findings. The latest figures from the *Judicial Appointments Annual Report* state that 49.5 percent of magistrates (excluding the Duchy of Lancaster) and 47.4 percent of magistrates within the Duchy are female (Department for Constitutional Affairs, 2003a).

3.4.2.6 Geographical spread

Dignan and Wynne (1997) are the only researchers to provide any information on the geographical spread of magistrates. In the North Midlands bench they examined, the 116 magistrates on the local bench were concentrated into a small number of local council wards. From a total of 70 council wards, 27 had no resident magistrate, while 33 magistrates lived in only five wards.

3.4.2.7 Community and voluntary service

The evidence suggests that magistrates are recruited from a narrow social elite; the main sources of recruitment being political parties, community organisations such as charities, voluntary bodies and trade unions. Indeed, evidence of wider community work has acted as an important criterion in the recruitment process (Burney, 1979; Raine, 1991). Hood (1972), Bartlett and Walker (1978), Burney (1979), King and May (1985), Henham (1990) and Dignan and Wynne (1997) all noted how magistrates are recruited from the same sources and participate in the same voluntary organisations. This evidence has been used to suggest that the magistracy is “a mysterious old-boy network” (Bartlett and Walker, 1978). “self-

perpetuating”, and packed “with like minded people or groups” (Darbyshire, 1997a):

however it is played, the game of choosing magistrates, which is supposed to be aimed at diversity, ends up with a team of people more remarkable for their likeness to one another than for their differences. And by its stress on social involvement, it ensures that most magistrates will have experience of co-operating with other people and therefore able to fit smoothly into a system which depends on teamwork and consensus when decisions are made in court (Burney, 1979).

The search by Advisory Committees for “common sense”, a “judicial mind”, “stability”, a lack of “extreme views” and “a balanced mentality” all add to the propensity to recruit like minded people (Burney, 1979; King and May, 1985; Pearson, 1980).

3.4.2.8 Widening the social base of the magistracy

Depending upon when the research was conducted, successive reports have lamented the unrepresentative nature of the magistracy to varying degrees. Generally speaking, the older the research the more confident the conclusion. Baldwin for instance noted that:

It is no surprise to find that the magistracy is not representative in any real sense of the wider community, although it is disturbing to find that patterns of selection in the recent past have not succeeded in affecting this situation (Baldwin, 1976: 174).

The conclusions of the Home Affairs Committee report were much more equivocal:

We did, however, receive evidence to suggest that in *some* areas the lay magistracy does not reflect the community it serves (Home Affairs Committee, 1996: para. 205).⁹⁰

Some of the earlier imbalances have been successfully alleviated by the recruitment activities of Advisory Committees and the Lord Chancellor. The magistracy is now gender balanced. Overall, the ethnic composition of the magistracy reflects the composition of society as a whole, although there are problematic areas where minority populations remain under-represented on the bench. Although the magistracy still has a majority of Conservative supporting members, the position is no longer as serious as it once was. However, the bench is still predominantly middle aged and middle class.

Numerous different reasons have been proposed for the social imbalance seen within the magistracy, and commentators and Government have frequently suggested that efforts to alter the composition are woefully inadequate (King and May, 1985; Darbyshire, 1997*a*; Lord Chancellor's Department, 2000*b*; Auld, 2001; Sanders, 2001). Among the reasons advanced for low recruitment of under-represented groups is the inability of working class and young candidates to secure time from away from employment, the over-reliance on the same recruitment channels restricting the pool of available candidates, a perception that working class or ethnic minority candidates may be unsuitable or that they

⁹⁰ Emphasis added.

may attempt to 'represent' narrow interest groups, and a lack of understanding of the role of magistrates in those under-represented groups.

However, the pessimism encountered when examining research reports on the composition of the magistracy need not deter efforts to widen that composition. Many of the earlier criticisms have been addressed in one way or another. Advisory Committees no longer merely react to nominations for appointment that come from the usual sources (Burney, 1979), but instead actively attempt to recruit from wider social circles. While these attempts may not be adequate enough for some (Auld, 2001), they do evidence a cultural shift that can hopefully lead to more active measures to widen recruitment to the magistracy. Some of the measures taken so far include: general marketing of the magistracy; awareness-raising activities and specific recruitment campaigns (Auld, 2001; Home Affairs Committee, 1996), sometimes aimed at ethnic minority recruitment (Lord Chancellor's Department, 2000b), and including the use of local radio (Lord Chancellor's Department, 1996); the fostering of close working relationships between large employers and the Magistrates' Association or local bench (Auld, 2001; Lord Chancellor's Department, 1996); and providing public recognition to employers who support employees who sit on the bench (Auld, 2001). *Judicial Appointments Annual Reports* have noted numerous strategies adopted to widen the range of appointments to the magistracy. The LCD has recently launched a National Recruitment Strategy for the appointment of magistrates, created a shadowing scheme in association with Operation Black Vote to raise awareness within minority communities and altered the advice given to Advisory Committees (Lord Chancellor's Department, 2002). Problems

with ethnic minority representation and political balance have been considered by the Lord Chancellor's Department (Lord Chancellor's Department, 1998*b*; Lord Chancellor's Department, 2000*b*), the restriction upon the visually impaired from sitting as magistrates has been removed after a pilot programme, and Advisory Committee members have received training in recruitment procedures (Lord Chancellor's Department, 2001). Finally, the LCD has computerised all its records on magistrates to facilitate effective monitoring of recruitment practices (Lord Chancellor's Department, 2000*a*).

This work is necessary if, as suggested earlier, the composition of the magistracy has important implications for the legitimisation of summary justice and the effective functioning of magistrates' courts. At present, the evidence suggests that the composition of the magistracy is unsatisfactory on the basis of any of the models suggested by Dignan and Wynne (1997) and as a result, serious concerns about the effectiveness of summary justice could be raised.

3.5 The rise of professional magistrates

Professional magistrates, now known as District Judges (Magistrates' Courts),⁹¹ but previously referred to as stipendiary magistrates, have increased in importance over the last ten to twenty years. Paid stipendiary magistrates were first introduced into London in 1792 in response to the corruption of lay Justices' of the Peace (Milton, 1967; Skyrme, 1983). The first provincial magistrate was appointed in Manchester in 1813. Since their introduction, paid magistrates were

⁹¹ Access to Justice Act 1999, section 78.

predominantly appointed in London and other large conurbations. However, the last ten years have seen a large increase in the numbers of paid magistrates; in 1991 there were 18 provincial stipendiary magistrates, 50 metropolitan stipes and 66 acting stipes. By 2000, there were 47 provincial stipes, 49 metropolitan stipendiary magistrates and 148 acting stipes (Seago et. al., 2000). However, their numbers pale into insignificance when compared to the numbers of lay magistrates; there were around 30,000 lay magistrates in 2002 (Lord Chancellor's Department, 2002). Nevertheless, commentators have still identified a number of reasons for examining the growth of the professional magistracy.

Sanders (2001) identifies three reasons for examining the professional magistracy. He believes that their growth is likely to continue, magistrates' courts are growing in importance, because of the impetus to transfer more cases to their jurisdiction,⁹² and because of a general lack of confidence with the lay magistracy. The existence of professional judges within magistrates' courts also raises a number of other issues that need addressing. In particular, the professional bench is said to potentially challenge local justice, increase the numbers of case hardened magistrates, while increasing the cost of summary justice (Sanders, 2001), to the extent that, when combined with other factors, Seago et. al. have questioned whether or not the growth of the professional bench impacts upon judicial independence (2000). Professional magistrates, by sitting alone, are also thought to potentially make inappropriate decisions because they lack the ability to consult with others and therefore account for alternative views

⁹² See Chapter 2.

(Sanders, 2001).⁹³ Lay magistrates may also see professional magistrates as a threat to their roles, by monopolising the most interesting caseload (Seago et. al., 1995). Nevertheless, it is also claimed that professional magistrates are more efficient and consistent, while the cost differential is not as large as initially thought (Morgan and Russell, 2000; Sanders, 2001). Sanders has investigated the quality of decision making in magistrates' courts by lay benches and professional magistrates by highlighting a number of different factors that help in such an assessment. He identified legal skills and social skills, the latter being separated into problems solving skills and fact-finding skills (Sanders, 2001). Social skills are said to depend upon a diversity of cultural experience while legal skills are developed through training. So, while professional magistrates will possess the necessary legal skills, lay benches, especially if they represent diverse experiences, will be better able to provide the desired social skills necessary for adjudication. For Sanders (2001) an effective system of summary justice should therefore make space for both roles.

The research available goes some way to addressing some of these issues by addressing the profile of professional magistrates, how they perform their role, how much they cost and how they are appointed. While in some respects Sanders (2001) is correct in his claim that there is no firm evidence to compare the respective merits of lay and professional magistrates, a number of tentative conclusions can and have been made. However, it must be borne in mind that any comparison is difficult, as professional magistrates are said to possess certain skills that justify their use in a manner different to lay magistrates (Seago et. al.,

⁹³ However, given the convergence of views on the lay bench, it is difficult to see how much better they fair by sitting in panels of two or three.

1995). Therefore, comparing the outcomes and processes of lay and professional benches may not be comparing like with like.

Morgan and Russell (2000), when comparing professional and lay benches, made a number of conclusions as to the role of professional magistrates and how they performed their role. Professional magistrates were predominantly male (84 percent) with 54 percent aged 45 to 54. They noted how only two professional magistrates were from an ethnic minority background. All professional magistrates must be drawn from the legal profession with 64 percent previously employed as solicitors. Additionally, of those barristers and solicitors recruited, 26 percent also had experience as a magistrates' courts' legal advisor. Seago et. al. (1995) reported that 57 percent of professional magistrates were between the ages of 41-50 and 87 percent were male. Of the 134 magistrates for whom the information was available, 72 were previously employed as solicitors, 38 as barristers, 23 as legal advisors and one as a metropolitan stipendiary magistrate.

As for the claim that professional magistrates "asset-strip court lists by having allocated to them the more serious and interesting cases" (Morgan and Russell, 2000: 26), Morgan and Russell found that while there may have been a slight preponderance of "heavy business" in their workload (2000: 27), overall it was not too dissimilar to the workload of the lay bench. Seago et. al. drew similar conclusions from the evidence in their study (1995).

Professional magistrates were accepted as being faster, largely due to having to retire less, needing fewer breaks and not having to consult with colleagues

(Seago et. al., 1995; Morgan and Russell, 2000). Nevertheless, this increased efficiency only held for certain types of hearing such as bail hearings, trials and cases previously adjourned for sentence. Only margin gains were recorded in mode of trial hearings and paper committals (Morgan and Russell, 2000).

As for decision making, the evidence tentatively suggested that professional magistrates were more likely to remand in custody, refuse adjournments and sentence to custody than their lay counterparts (Morgan and Russell, 2000). However, there was no discernable difference in the rate at which they declined jurisdiction in mode of trial hearings. Morgan and Russell also reported that lay magistrates in courts with professional magistrates were more likely to turn to custodial sentences than their lay counterparts in courts without a professional magistrate. Flood-Page and Mackie (1998) reported that, controlling for other relevant case factors, professional magistrates were more likely to sentence to custody, although other case factors were far more important. They also found that lay benches in courts with a professional magistrate were more likely to impose custodial sentences than lay benches without a professional magistrate.

Court users valued the input of professional magistrates. Morgan and Russell (2000) noted that professional magistrates commanded proceedings, were clear and concise in providing reasons and effectively managed proceedings. Indeed, courtroom professionals commented upon how they believed that they needed to be more prepared for an appearance before a professional magistrate.

Finally, professional magistrates were regarded as more expensive than lay magistrates, but given the benefits of sitting alone, their greater efficiency and the benefits that resulted through less courtrooms, fewer staff, lower overheads, and the release of other professional's time, the cost differential was not as large as first thought; Morgan and Russell suggested that the difference was merely 12 percent (2000).

Given their effectiveness, and the concern with courtroom delays (Home Office, 1997b) the increase in professional magistrates can be expected to continue. Whilst Seago et. al. examined professional magistrates with a view to assessing judicial independence, they concluded that, for the most part, the concerns raised about professional magistrates are unfounded. They provide a degree of efficiency while being relatively cost effective. And while it is true to say that they do not represent the local population, neither do lay benches (2000). As shown in Morgan and Russell (2000), professional magistrates also gain the respect of other courtroom professionals. Nevertheless, more research needs to be conducted into their sentencing outcomes; the little evidence that is available suggests that they sentence more harshly, and that this influences their lay colleagues. Finally, Seago et. al. noted that the growth in the professional magistracy has taken place against a backdrop of arguments about economy and efficiency, with little discussion as to the problems of principle raised by their position (2000). Indeed, the criterion for appointment of a professional magistrate – excessive courtroom delays, excessive reliance upon two-member courts or excessive burdens on individual magistrates and large bench sizes – all point to administrative concerns (Seago et al., 1995). If the numbers of

professional magistrates are to increase further, then the calls of Seago et. al. need to be addressed.

3.6 The quality of justice in magistrates' courts

The quality of summary justice can be, and has been, assessed and measured utilising different criteria. This section will evaluate the essential differences in legal procedures between the magistrates' and Crown Court, how the composition of the bench impacts upon decisions, and the staging of summary justice. These three problems, when combined, seriously question the wisdom of the wholesale transfer of cases from the Crown to magistrates' court.

3.6.1 Legal differences

The first major difference between summary and Crown Court proceedings relates to the disclosure of prosecution evidence. The Magistrates' Courts (Advance Information) Rules 1985 oblige the prosecution in either way cases to provide the defence either with a summary of the case or with copies of prosecution witness statements.⁹⁴ Presently, any either way offence in the Crown Court must have been subjected to committal proceedings, resulting in the defence receiving full copies of any witness statements and information on any unused material. Although it is possible for the CPS to supply this information to the defence in either way cases subject to summary trial, the prosecution need

⁹⁴ SI 1985 No. 601.

only provide a case summary and the practice of CPS branches differs considerably (Sprack, 2002).

Another procedural difference between the magistrates' and Crown Court concerns the admissibility of evidence. Whenever the defence wish to challenge the admissibility of evidence within the Crown Court, the jury retire and the judge then rules on the admissibility of evidence in the absence of the jury. This procedure thereby ensures that any material that has been ruled inadmissible will not prejudice the jury. However, in the magistrates' court, the magistrates who hear the case determine the admissibility of evidence. Having heard the evidence when deciding admissibility, it may be inevitable that the bench will be influenced by evidence that has been ruled inadmissible (Sprack, 2002).

3.6.2 Shared world views

The effect of the recruitment process examined above is said to produce a magistracy that is remarkable for its shared outlook (Burney, 1979; Pearson, 1980). The emphasis in the appointment process upon 'common sense', the ability to cooperate with colleagues and a public service ethos promotes conformity within the magistracy. This stress upon 'common sense' hides ideological and political assumptions, takes for granted the consensual nature of legal discourse and therefore perpetuates the status quo (Worrall, 1987). Furthermore, on the evidence available the training experience fails to challenge these dominant attitudes. Bond and Lemon (1979) have suggested that training may impact upon the procedural activities of magistrates but does little to affect

“deep seated views on penal philosophy and policy” (Bond and Lemon, 1979: 139). This is not to say that decisions are pre-determined beforehand, but rather that the range of possible responses is constrained by this shared culture and outlook. There is a wealth of research literature that ascribes importance to local bench cultures in a whole host of decision making areas. Bench culture is said to play a part in the determination of venue (Bottoms and McClean, 1976; Hedderman and Moxon, 1992), remand decisions (Jones, 1985; Hucklesby, 1997) and sentencing (Flood-Page and Mackie, 1998; Henham, 1990; Hood, 1962 and 1972; Rumgay, 1995; Tarling, 1979; Tarling et. al., 1985). Raine claimed the result of shared decision making is that:

the magisterial decision making process is, of course, inevitably influenced by other knowledge, attitudes and values which bench membership happens to hold. In this respect the administration of justice in the magistrates’ courts cannot be seen as other than a value laden process, an understanding of which clearly relates to the dominance of middle class representation on the bench (Raine, 1989: 80).

The importance of values in the decision making process has been documented to varying degrees by other research studies. While Henham failed to find a link between magistrates’ philosophies and sentencing behaviour he did comment upon the importance of local cultures (1990). Hood drew attention to the treatment of working class offenders by a middle class bench and suggested that evidence existed to show how a middle class bench may be “relatively severe” when dealing with working class defendants but only in “relatively small and stable middle-class communities” (Hood, 1962: 120). Other writers have been less equivocal; Worrall claimed that the attachment to common sense by

magistrates led to a number of consequences for a female defendant. Women were said to have to conform to stereotypes on sexuality and domesticity, while offending behaviour was more likely to be explained utilising a pathological framework (Worrall, 1987). Eaton drew similar conclusions:

The dominant model of the family is one which is reflected in, and reinforced by, courtroom discourse. It was implicit in pronouncements from the bench, pleas of mitigation, and probation officers' reports. The family context of the defendant formed the basis of much courtroom discussion. In discussing these contexts the court officials did more than describe a variety of domestic arrangements, they revealed their assumptions concerning the appropriate ways in which families should be organised, and their expectations concerning the result of such organisations (Eaton, 1986: 93).

Pearson (1980) saved her criticism for the housewife with limited experience who serves on the bench. The lack of any regular contact with alternative realities was said to result in the "expression of antagonistic sentiments about working mothers" and "bigoted attitudes towards immigrant families" (Pearson, 1980: 86). Pearson also quoted a magistrate who displayed a lack of appreciation for working class defendants who needed to take time off work to attend court and therefore attended in working clothes.

Parker et. al. (1989) also examined common sense within the courtroom, as well as the individualisation of cases (every case is different), and concluded that these positions allowed reliance upon irrelevant criteria in the decision making process. This includes the making of inappropriate moral judgments:

Magistrates' moral judgments of the defendant's character not only appear explicitly, but also pervade their interpretations of other considerations, such as the defendant's family circumstances or the significance of information given in school and social enquiry reports (Parker et. al., 1989: 117).

The shared outlook has been said to predispose magistrates to readily accepting police evidence (Blythe, 1972; Burney, 1979; McConville, et. al., 1994; Vennard 1982), a position reinforced by the structural position of the police in the courtroom. The police's structural advantage results from their experience in the courtroom, the authentication of evidence from notes and mutual support deriving from the evidence of other police officers (McConville, et. al., 1994).⁹⁵

3.6.3 The staging of magistrates' justice

Studies have examined the processes of summary justice from a more sociological perspective in terms of "the staging of magistrates' justice" (Carlen, 1976a) and show a concern with the place of the defendant within the courtroom. Not only is the defendant said to be bewildered by a number of devices that have placed her within the courtroom, but the proceedings themselves are said to be defined in such a way as to deflect any searching gaze through a minimisation of importance of the proceedings. This also helps create a climate whereby legal argument is seen as inappropriate.

⁹⁵ Bankowski et. al. (1987) described a more complex situation in the District Courts in Scotland where only the most senior magistrates routinely accepted police evidence while younger magistrates displayed a more sceptical outlook. However, this scepticism may not have resulted in changes to routines in the courtroom as it was felt to be difficult to identify false police evidence. Therefore, the result may well have been a general acceptance of police evidence tempered with scepticism (Pearson, 1980).

3.6.3.1 Spatial dynamics and courtroom workgroups

The spatial dynamics within the courtroom and the timetable of action are said to operate so as to disadvantage the defendant. Spacing determines who can be heard and by whom, while the acoustics are such that defendants are unable to follow courtroom proceedings (Carlen, 1976a). The need to project to the whole courtroom is not conducive to the disclosure of confidential information, defendants and witnesses are expected to answer the advocate's questions while addressing the bench – a difficult presentational modification of everyday interaction – and long waiting periods are said to increase anxiety (Carlen, 1976a). Defendants view the courtroom as a mystery, while the court personnel are all repeat players who understand the rules of the game and conform accordingly (Bottoms and McClean, 1976; Carlen, 1976b).

Combining these features together leads Carlen to claim that the defendant is a “dummy player” (1976b).⁹⁶ At the time that Carlen was writing, legal representation was the exception within magistrates' courts (Dell, 1971) but this is no longer true.⁹⁷ So while the defendant may now be a dummy player with a lawyer, legal representation may not necessarily be the answer. Defence lawyers need to keep their credibility in the eyes of other courtroom users, resulting in a conflict between the interests of their client and the necessity for conformity: if a defence solicitor, “made an assessment that a defendant was adamant about

⁹⁶ Other courtroom workers praise the manner in which magistrates use simple language (Morgan and Russell, 2000). However, the views of courtroom regulars, well versed in courtroom procedures and language are not the most relevant when judging the appropriateness of courtroom language.

⁹⁷ As early as 1982 Vennard reported that 92 percent of defendants in her sample were legally represented (Vennard, 1982). McConville et. al. (1994) noted how the spread of legal aid increased legal representation in magistrates courts.

making a bail application, they made it clear to the court that they did not agree” (Hucklesby, 1997: 139). The most frequent linguistic device employed by advocates is the phrase, “I am instructed by the defendant”, used to distance the lawyer from the submission (McConville et. al., 1994; Parker et. al., 1981). Alternatively, relevant issues, such as evidential challenges, are not raised at trial as it may be thought to be “obstructive or counterproductive” (Wasik, 1996: 859). The logical extension of these informal norms is the courtroom workgroup:

as courtroom workers begin to translate duties and regulations into everyday routines something happens. Justice concerns are submerged as interest focuses on managing caseloads and getting work done. Legislative guidelines become secondary to typifications and different categories of offenses are developed in courts according to the social worth of each offence in relation to others. Organizational policies and guidelines are modified as specific employees find ways to accommodate co-workers (Lipetz, 1980: 58).

The increase in legal representation also has the effect of supporting the courtroom workgroup, as the potentially disruptive defendant can now be controlled by their legal representative (Parker et. al., 1981). Conformity with workgroup norms also aids the creation of feedback loops as courtroom regulars make submissions that fit with the perceived culture, thereby supporting and reproducing that culture (Hedderman and Moxon, 1992; Parker et. al., 1981). Courtroom practice therefore takes the form of cultural production and reproduction.

3.6.3.2 Triviality

To read law books for information on the magistrates' courts is to come away with the clear impression that what goes on in them is overwhelmingly trivial. They deal with 'minor offences', 'everyday offences', 'the most ordinary cases', 'humdrum events' (McBarnet, 1981: 143).

The ideology of triviality is sustained by law books, media reporting of summary proceedings and the penalties dispensed by magistrates (McBarnet, 1981). The ideology is so pervasive that it is shared by magistrates themselves; magistrates wonder at members of the public who spend any time in magistrates' courts and are even more amazed at requests that make them the subjects of research. The ideology is said to have many derogative effects mostly concerning the procedures adopted in the courtroom (ibid.). As cases are not seen as serious or worthy of detailed attention lawyers do not prepare adequately,⁹⁸ points of law are seen as inappropriate (ibid.) and "points of evidence are overlooked" (Wasik, 1996). Darbyshire quoted an "experienced defence solicitor" on the appropriate use of legal argument:

'As soon as you start citing the law of evidence you've lost the magistrates' so he rarely bothers (Darbyshire, 1997c: 112).

There is, however, nothing inherent in the offences and cases, that are the staple diet of magistrates, that necessitates such an approach. Triviality is a "legal

⁹⁸ Interestingly, lawyers are said to prepare more for District Judges (Magistrates' Courts) (Morgan and Russell, 2000).

construct” created by the working norms of the repeat players (Bankowski et. al., 1987; McBarnet, 1981: 148).

3.6.4 The burden of proof

The perception that the magistracy is pro-police has already been alluded to above.⁹⁹ The best description of the magistracy’s view of the police is from an East Anglian village magistrate:

I think that the relationship between the police and the Bench is very good. The police, are, on the whole, straightforward and trying to do their best. Now and then you get a type who must go too far. But when you consider how they are provoked, they are marvellous people (Blythe, 1972: 289).

The disadvantaged position of the defendant does not just extend to police witnesses. In a study examining the effects of removing the right to silence, a defence solicitor who questions the burden of proof in magistrates’ courts is quoted as saying:

We sometimes wonder [at magistrates’ courts] who has to prove guilt or innocence. Certainly, sometimes I’ve felt that I’m the one who’s having to do all the work – whereas really it should be the prosecution who are proving all the elements, rather than the defence having to disprove the elements of the offence (Bucke et. al., 2000).

CPS prosecutors also expressed the belief that the defence needed to do more than ask the prosecution to prove the case against the defendant. In particular,

⁹⁹ See section 3.6.2.

many practitioners believed that the modification of the right to silence, enabling the drawing of adverse inferences from silence, had no effect as magistrates were already drawing those inferences before the law was amended (ibid.).

3.7 Conclusions

The evidence raised in this Chapter must raise some serious concerns for the shift in criminal cases to the magistrates' court described in Chapter 2. Not only does it raise problems with the propensity of magistrates to convict, but it also suggests that magistrates' courts may encounter a crisis of legitimacy if this shift continues and little is done to address the concerns that have been raised on the composition of the magistracy (Pearson, 1980). Two of the models of summary jurisdiction examined above justify the widespread use of lay persons within the criminal justice process on the basis of their representative function. They provide a "community face" to the legal system (Bankowski et. al., 1987). The third model privileges the fact finding role of the magistracy and the evidence also suggests that a balanced bench is important for this function if magistrates are to understand fully the contested nature of evidence and the viability of alternative explanations suggested by defendants. In addition to these concerns relating to the composition of the magistracy, this Chapter has also raised problems with the staging of magistrates' justice. Although some of the concerns raised may well equally be applicable to the Crown Court as part of the disorientating experience of legal processes, the triviality of the magistrates' courts and the widespread belief that summary jurisdiction is simple and unimportant alter the nature of this concern. The lack of safeguards within the

magistrates' court combine with the alienating aspect to leave the defendant isolated and exposed, but as the magistrates' courts are perceived to deal with nothing more than trivia, sceptical gazes are diverted elsewhere to the real business in the Crown Court. This desire to define deviance down, has parallels across the criminal justice process and is part of the state's response to the problems of burgeoning criminal justice budgets (Garland, 1996).¹⁰⁰ It is questionable whether the Government is able or willing to either reverse the slide towards summary justice or tackle the problems identified with magistrates' courts.

¹⁰⁰ Evidence suggests that prosecutions for offences against the person (Clarkson et. al., 1994) and sexual offences (Gregory and Lees, 1996) are being managed in such a way as to charge less serious alternative offences that minimise the symbolic impact of a prosecution.

CHAPTER FOUR

TOWARDS A MODEL OF COURTROOM INTERACTION

4.1 Introduction: The story so far

Chapters 2 and 3 introduced issues that are central to the research but have only taken the discussion so far. Chapter 2 outlined the mode of trial decision and placed the research within the historical context of a drift towards summary trial. Chapter 3 addressed some of the concerns about magistrates expressed in the debates examined in Chapter 2. However, Chapter 3 also introduced themes important to the overall thrust of the thesis; Chapter 3 implied that the decision making practices of magistrates cannot be examined solely on the analysis of legal procedures, rules and guidelines. The Mode of Trial Guidelines may give a framework to the decision that magistrates have to make, but they contain insufficient detail to provide an overarching coherence to magistrates' practices. The discussion about a possible link between the composition of the magistracy and the decision making processes of a particular bench, suggests alternative sociological explanations for magistrates' behaviour. These explanations fill in the gaps that are found within the Mode of Trial Guidelines and provide a more comprehensive explanation of decision making behaviour.

However, the research examined in Chapter 3 on the decision making practices of magistrates only serves as an introduction to the issues that need to be tackled in this Chapter. There are two fundamental problems with the research on the

magistrates' decision making practices examined in Chapter 3. Firstly, although the social class, gender, race or age of magistrates, or the staging of magistrates' justice, may influence to a greater or lesser extent the decisions that are made, these are not the only influences upon behaviour. Secondly, the research examined on the composition of the bench and decision making practices suggest a rather simplistic black box model of behaviour, the black box being a homogenised magistracy. While the evidence suggests that overall the magistracy looks very similar, different benches behave in different fashions and this difference is usually attributed to a local bench culture. Something other than the universal staging of magistrates' justice or the composition of benches must help explain such differences of approach. Decision making practices cannot be simply explored by opening up the black box and seeing what is inside; for a fuller understanding of magistrates' behaviour, a range of different approaches is needed that examine the multifaceted aspects of courtroom interaction. This Chapter therefore aims to move beyond an understanding of magistrates' justice that is blinkered by legal frameworks and debates on the composition of benches. While the legal framework, the composition of benches and the staging of magistrates' justice are important, any strides towards a complete understanding of the operations of magistrates' courts necessitate a deeper examination of the interactions that take place there. This Chapter therefore aims to move towards such a model of courtroom interaction. The theory developed will provide a theoretical lens for viewing the working of magistrates' courts and will focus upon four different aspects of courtroom interaction: the personality and attitudes of actors within the courtroom; the interaction itself; the dynamics of the

courtroom setting; and the resources drawn upon by the actors within the courtroom.

4.2 The theory of social domains

In *Modern Social Theory*, Layder (1997) described a theoretical framework for analysing everyday face-to-face interactions that synthesised a number of different approaches. Central to the theory is Layder's description of the four domains of social activity: psychobiography; situated activity; settings; and contextual resources. For Layder, any attempt at explaining everyday social encounters must acknowledge the influence of these four domains.

4.2.1 Psychobiography

This domain relates to the identity of any individual concerned in social encounters. Conceptions of self-identity, emotional attachment, attitudes to others, personal goals and life history are all said to influence an interaction. More specifically, in calling for the personality of actors to be taken into account, Layder requested a re-evaluation of the importance of agency. For Layder, theories that devalue the role of human agency necessarily fail adequately to describe the social world. For example, Layder criticised the early work of Foucault for privileging the concept of discourse. In *Madness and Civilisation*, Foucault (1967) described the history of the concept of insanity and how the discourses surrounding madness shaped our conceptions of insanity. However, our conceptions were not the result of choices made after full consideration was

given to all the arguments; they were a product of the time-specific social and political needs and the growth of institutional discourses. Within this reconceptualisation of history, the role of the individual practitioners and scientists is secondary to social organisation and the discourses of society. Insanity and madness were not therefore discovered by scientists pushing back the boundaries of knowledge, but were rather functional creations of a specific time that served the interests of dominant social groups and the scientists themselves, whose expert knowledge advanced their social situation.

While Layder accepted that social constraints (whether these be structural in nature or a result of discourses – i.e. what passes as acceptable knowledge) do impact upon the social world, any analysis of face-to-face interaction should take account of inner-subjectivities in shaping interactions:

Typically this kind of Foucauldian analysis is coupled with a rejection of the subject (or the individual) and hence cannot easily register the identity and personality-forming influences of human agency in the arena of face-to-face interaction (Layder, 1997: 46).

This is a call to re-energise the agency-structure dialectic with a claim that the social world cannot be reduced to structural constraints at the expense of human struggle. However, the objective reality of the social world for social actors and its impact upon social interaction cannot be ignored. For instance, Layder accepted that the psychobiographical domain could not be examined in isolation from other social domains; personality is necessarily influenced by other domains of social activity.

4.2.2 Situated activity

The theory of social domains requests a consideration of how activity is influenced by the “interaction order” (Goffman, 1983) and necessitates an appraisal of how the specific interaction takes shape. Social interactions take place between social actors who interpret the world around them and then act upon these interpretations. For instance, conversation analysts will examine practices whereby actors jointly construct their interaction, focusing specifically upon how the use of conversational norms both bound and facilitate the interaction. This social domain carries importance for how it helps contribute to the process of interaction:

the coalescence of a number of different personalities and their behavioural inputs creates a social effect that is more than the sum of its constituent parts. Collective arrangements and shared understandings are created during the encounter that influence the subsequent proceedings (Layder, 1997: 85).

While this approach rightly emphasises the shared nature of social interactions and the achievements of actors in creating a shared social world, it does lose sight of the moral content of interactions (Silverman, 1985). Conversational analysis, with its focus upon activities, speaks little on the structures of the social world or about how these are evidenced within conversational practices. This is not to belittle the influence of situated activity, merely to place this social domain in the context of the other three social domains. While any interaction may have a dynamic peculiar to that interaction, it should not be forgotten that this dynamic is influenced by wider questions of social structure and the individual

personalities of the actors. In other words, while each domain has an independent existence, no social domain is wholly independent of another.

4.2.3 The setting

The setting of any interaction, and the roles that actors have to play within the setting, also influence the course of interaction. For instance, if an interaction takes place within the setting of an undergraduate seminar, the roles of the participants, along with the expectations of the setting, help to explain what occurs. Seminar participants are expected to conform to a number of different expectations vis-à-vis the other participants and the seminar leader. There is an expectation regarding the types of topics that are deemed relevant as well as an appropriate expectation as to the style of the interaction. Quite simply, the interaction that takes place within an undergraduate seminar is not a free for all but is a focused interaction where the participants bring a number of expectations and beliefs, shaped by the setting, on how the interaction should progress.

Different settings will engender different expectations for the roles of participants. Novel settings for instance may stimulate fewer expectations than settings with rich cultural histories. Some settings demand formality while others suggest a more informal style. A university lecture, for instance, will create different norms than the more informal seminar, which will again differ from a friendly chat between lecturer and student.

4.2.4 Contextual resources

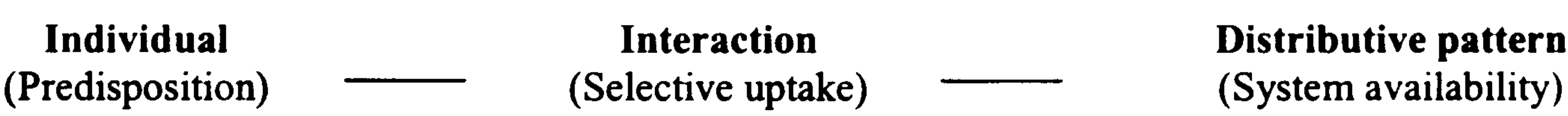
Any study of focused interactions should account for the contextual resources that the participants take to the interaction. The domain of contextual resources includes the discourses that participants are able to draw upon, the social position of actors and the power that they possess. In short, the domain is focused upon wider social structures, the part they play within interactions and an individual's place within society. Concepts such as gender, race and class are all implicit in contextual resources. For instance, interactions within a doctor's surgery will be influenced by the contextual resources that each bring to the interaction. The doctor will be able to draw upon reserves of social power implied by the knowledgeable position of the professional and as someone who knows best. The doctor may well expect some degree of deference and will utilise professional knowledge to manage the situation and elicit information from the patient that the *doctor* feels is relevant to a diagnosis. How much a patient is able to resist this process and exert control (assuming that they wish to take control) will depend upon the contextual resources of the patient. A patient may draw upon medical knowledge or assert power in other ways, such as utilising social status, but such an attempt will only be successful if the patient actually possesses such resources to draw upon.

4.2.5 The interaction as the link

All four social domains are implicated within any interaction. The specific interaction within a social setting is the link between the individual psychology

of the participants and the contextual resources that are brought to the interaction. Figure 1 explains this relationship.

Figure 1: The interaction as the link



Source: Layder, 1997: 123.

Within any specific interaction, in a particular setting, the availability of resources and the predisposition of participants meet to influence the course that an interaction may take. The interaction cannot therefore be reduced to any of the specific domains, but is instead a complex relationship between all four. Now that a brief explanation of the theory has been outlined, it is time to see how the model can be used to assist in an understanding of courtroom interactions.

4.3 Psychobiography: The composition of the magistracy and the judicial attitudes of magistrates

Chapter 3 introduced the idea that judicial attitudes influenced behaviour and that bench attitudes were shaped by recruitment processes and exposure to bench culture. Attitudes here refer to a “framework of meaning” possessed by magistrates (Brown, 1991: 6) and “how a magistrate defines ‘self’ in relation to the persons, problems and ideas he confronts in his daily work” (Hogarth, 1971: 24). Evidence has already been examined that suggests that magistrates are

recruited for their ability to work with other magistrates and how this assists in the creation of a shared culture.¹⁰¹

Two research studies utilised the attitudes of magistrates as central to an explanation of decision making practices.¹⁰² Hogarth (1971) examined the sentencing practices of Canadian magistrates, while Brown (1991) examined the manner in which magistrates used information in the youth court to assist sentencing. Both concluded that the attitudes of magistrates were influential in the sentencing process. To understand the approach of magistrates, both studies placed their attitudes within a larger framework which acknowledged that attitudes are not formed within a vacuum. In other words, while not explicitly appropriating the terminology of Layder, both acknowledged the influence of other social domains in the sentencing process. Hogarth, for instance, noted how other constraints such as law, the social system and “other features of the external world” are used within the sentencing process, but only in a way that resonates with the pre-existing attitudes of magistrates (Hogarth, 1971: 343). Information presented within the courtroom was selectively used in a manner that confirmed these attitudes. For Hogarth therefore, although other social domains influence the sentencing process, it is necessary to understand that magistrates will internalise some of these constraints rather than others. It is the process of internalisation that determines the “degree to which these constraints actually influence sentencing” (Hogarth, 1971: 200). However, the internalisation process is dependant upon the pre-existing attitudes of magistrates; magistrates interpret these external constraints “in a way which

¹⁰¹ See section 3.6.2.

¹⁰² Additionally, Rutherford (1993) has examined the role of penal philosophy in the working ideologies of criminal justice practitioners.

maximises concordance with their personal attitudes” (Hogarth, 1971: 209). Therefore, Hogarth implicitly noted the importance of other social domains: the contextual resources of the magistrate influenced the internalisation of external social restraints and the restraints of law;¹⁰³ the expectations of the setting acted as constraints; and interaction resulted in the presentation of information that needed to be assessed by the magistrate. However, for Hogarth, the attitudes of the magistrate were of prime importance as these determined which constraints were accepted as relevant to any interaction.

Brown also focused upon the importance of attitudes in the sentencing of young offenders. She theorised that magistrates shared a common culture and philosophy on crime causation and sentencing. In particular, magistrates worked within an informal ‘control theory’ (Williams, 2001) that emphasised the role of the family in controlling delinquent behaviour. Offenders who were therefore able to show that offending behaviour was a one-off, with others usually exercising adequate care and control, often escaped with a low tariff disposal, whereas offenders perceived to have no or little attachment to the family or the community, would be subjected to higher tariff disposals. This philosophy also contained implications for the way that magistrates viewed the world and masked values that interpreted the world through the lens of a “patriarchal family structure conforming to the closed and narrow world of suburban middle class values” (Brown, 1991: 41). The information that was placed before the bench was usually interpreted within the confines of this framework. Regardless of the aims of the author of a report on a young person, be they social workers,

¹⁰³ In particular, Hogarth acknowledged social class as being important in the attitudes of magistrates for the “collective sentiments and values” of a class (Hogarth, 1971: 54).

headmasters or probation officers, magistrates would selectively choose information from the report that resonated with their theories on crime control.

4.4 Situated activity: The magistrates' court as a theatre of the absurd

[B]oth the American theorists and the English investigators have tended either to ignore or take for granted other, equally consequential, dimensions of socio-legal control: the coercive structures of dread, awe and uncertainty depicted by Camus and Kafka: the coercive structures of resentment, frustration and absurdity depicted by Lewis Carroll and N. F. Simpson. The idea, however, that such surrealism and psychic coercion properly belong to the world of the French novel, rather than to the local magistrates' court in the High Street, is erroneous (Carlen, 1976a: 48).

Carlen, in this plea to French literature, asked the reader to contemplate the interaction within the magistrates' court, and how the "furniture, state-props, scenic devices, tacit scheduling programmes, etiquettes of ritual address and reference" bring meaning to interactions (Carlen, 1976a: 48). In short, Carlen asked for a realisation that the interaction in magistrates' courts is unequal and unbalanced.¹⁰⁴ The ideas expressed by Carlen, although drawing attention to the difficulties that defendants face in the legal process and reminding academic researchers of the brilliance of Kafka (1935) and others in highlighting the bewildering experience the legal system generates, neglects the extent to which courtroom interaction necessarily relies upon procedures that the defendant and others will find strange. Atkinson and Drew, in *Order in Court* (1979), described how the multi-member interaction within the courtroom necessitates procedures that differ from the normal conventions of everyday life. They use the

¹⁰⁴ Carlen's thesis was outlined in section 3.6.3.1.

ethnomethodological approach of conversation analysis to praise the achievement of members in constructing conversations and a shared social world. The emphasis is upon the interaction and the informal rules that are relied upon in achieving a shared understanding. While Carlen sees the informal rules that structure interaction within a magistrates' court as bewildering, conversation analysts marvel at the turn taking conventions, the use of adjacency pairs to structure conversations and the means of displaying attentiveness by members of an interaction. The turn taking rules concern the selection of speakers while adjacency pairs, such as question – answer or summons – response, structure interactions. Members display attentiveness by observing turn taking rules or providing the correct response to an adjacency pair, and when a member fails to provide a correct response, remedial action is taken. What Atkinson and Drew (1979) achieve is to show how the aims and form of courtroom interaction result in a modification of usual conversational rules. As is the case in some multi-member settings, participants need to focus upon *one* conversation and refrain from participating in competing interactions. So as to avoid the problem of displaying shared attentiveness in such a situation¹⁰⁵ and to avoid the breakdown of the conversation into a plurality of interactions, informal and formal rules operate that allow participants to monitor proceedings. The layout of the courtroom enables the identification of participants for the uninitiated. While the raised position of the bench may suggest imagery of control and oppression, it also assists the uninformed observer in identifying who legitimately controls the proceedings. Each feature of the interaction criticised by Carlen could be said to serve a legitimate purpose in structuring the interaction. For instance, the

¹⁰⁵ For instance, not every actor in the courtroom is able to answer a question to show that they have understood the interaction.

physical distance between the parties may force the witness to converse at an unnaturally high volume, but it does result in everyone else in the courtroom being able to hear the witness. This is also the case for poor courtroom acoustics. Reducing the physical distance between witness and inquisitor, while being sensitive to the listener, would be “totally insensitive to the minimal listening requirements of everyone else in the courtroom” (Atkinson and Drew, 1979: 224). Furthermore, exploring other avenues to solve this problem, such as introducing microphones or earphones or placing everyone really close together may be equally “‘unfamiliar’ or ‘unpleasant’” (Atkinson and Drew, 1979: 225). The claim that these “manifestations of ‘oppression’ at the ‘micro-level’” reflect “the more ‘generalised oppression’ associated with the ‘macro-structure’” misses the point that these informal rules are necessary to achieve a shared understanding (Atkinson and Drew, 1979: 226).

4.5 The setting: The courtroom workgroup and trivial interactions

Most of the work on the setting of magistrates’ courts has already been considered in Chapter 3. The ideology of triviality and the existence of courtroom workgroups are both specific examples of how particular features of the setting for an interaction can influence behaviour. For instance, the courtroom workgroup is said to help in the maintenance of consensus to the extent that professionals serve the workgroup rather than their client. However, the workgroup can be open to outside influences: Feely emphasised the “open nature” of courtroom interactions and the possibility of external influences impacting upon procedures (Feely, 1992: 21), while Lipetz acknowledged that

the strength of any workgroup was subject to different considerations. Workgroups may not work if a new member does not accept or understand the informal norms, when a member asserts self interest or legal constraints over and above the informal laws or when new outside constraints originating from “supervisory agencies” force changes in the organisation of the workgroup (Lipetz, 1980: 53).

4.6 Contextual resources: Discourse, power, the legal system and narratives

The social domain of contextual resources involves the structural position of the participants within any interaction and how this position influences interactions. For instance, members of the public very rarely use technical legal discourse when framing claims within the courtroom – lawyers will translate these claims into legal claims – although they may rely upon quasi-legal concepts such as justice, or use other concepts such as “assault” that have gained an extended meaning to the narrow technical definition ascribed to the concept by the law. While this thesis acknowledges the importance of all four social domains, the later data analysis concentrates on the contextual resources that framed the mode of trial hearing. As a result, this section is more developed than those previously and will examine the discourses that are used in the courtroom, the play of power in the interaction, how law structures knowledge and how legal narratives are constructed. Together, these might very loosely be defined as structural influences on courtroom interaction and are crucial in framing these interactions.

4.6.1 An introduction to courtroom discourse

Standard courtroom mythology conjures up images of conflict and adversarial battle. While the reality may differ from the rhetoric (Baldwin and McConville, 1977), there are times when a courtroom is a site of struggle and challenge. However, courtroom struggles are not limited to ascertaining the facts but extend to giving meaning to agreed facts; that is, the participants struggle to have their view and interpretation of events accepted by the court. This struggle can lead to the mobilisation of different interpretations based upon alternative discourses. Discourse in this sense can be taken to refer to “a specialised language, a particular jargon”; “a more or less coherent set of categories and theories of action” (Merry, 1990: 110); a body of knowledge on a particular subject – such as criminology – or sequences of statements that form conversations and narratives (Conley and O’Barr, 1990); a system of communication that utilises “common reductive terms” (Nobles and Schiff, 2001: 201); or “a regularity” “between a number of statements” (Foucault, 1972: 38). Whatever the terminology used, what is important to grasp is that, either implicitly or explicitly, courtroom actors may draw upon different discourses at different points in the proceedings when defining action.

The choice of discourse used to describe events affects the manner in which an event can be seen or categorised. While different discourses can be mobilised in support of pre-existing orientations to problems, some actors are pre-disposed to utilise favoured discourses. Lawyers are trained to fashion conflicts and problems within the discourse of law, while a social worker may perceive an

event through the lens of an alternative or competing discourse. A brief fictional example will suffice in explaining the importance of discourse in interpreting events. A neighbour calls out the police to a late night disturbance in a block of flats. Upon arrival, the police find a husband and wife in the middle of a heated exchange and both parties have resorted to violence. Different observers of (or participants in) this event will define it in different ways. The neighbour may see this as a disturbance that has shattered the peace and tranquillity she expects in her living space. She wants this disturbance to end so that she can continue to read her book, so she calls the police because they possess the powers to end the disturbance. The police, however, may define the situation in numerous ways and each suggests possible solutions. The incident may be seen as a domestic with public order implications (the disturbance to the neighbour) but no other reason for action. The police will therefore act to end the disturbance as soon as possible with no perceived need to initiate further action. Alternatively, the police may view the problem as a situation where a criminal offence has been perpetrated and the offender may well be arrested and criminal proceedings initiated. The participants may view these activities as symptomatic of marital breakdown and either seek guidance and counselling or decide to end the marriage. One partner may view the actions as resulting from the drinking activities of the other and request that help be sought to treat the addiction. The local authority may view this disturbance as part of a sequence of anti-social behaviour and may evict them from the flat, or initiate civil proceedings such as an injunction or an anti-social behaviour order to address the problem. Social services, relatives, medical professionals and others may all interpret these events in differing fashions. The

main feature, however, is that each position acknowledges a discourse that names the problem, interprets its meaning and “points to a solution” (Merry, 1990: 111).

Relating this to the incident in the block of flats, each explanation draws its explanatory power from the discourse that frames the interpretation and points to a solution. If the incident is interpreted as an assault, the discourse of the criminal law is invoked with prosecution being the solution. If the event is seen in the context of alcoholism, a medical discourse would underpin any analysis; the actions of the patient are a consequence of disease and a diagnosis points to a treatment solution. A social-work discourse may view the incident as symptomatic of marital breakdown. Each of these discourses implicitly acknowledges differing world views. Orthodox criminal law interprets action as being the consequence of individual choices (Norrie, 2001), whereas the medical example denies individual culpability as alcoholism is a disease that caused the behaviour. A social work discipline would view the marital breakdown as a contributing cause. Each approach offers different solutions: the criminal law demands punishment to either reinforce disciplinary rules or reflect the conscious wrongdoing of the offender; the medical approach denies individual culpability and finds the cause of action to be disease, thereby reinforcing the need for treatment; while the social work approach suggests marriage guidance as a solution to the problem. What is interesting is that no approach has any overall claim as truth. The claims that the protagonists make as viable solutions make sense within each discourse and, furthermore, no discourse makes a more appropriate validity claim than another. Indeed, the claims made really only make sense when examined from the perspective of the implied discourse

utilised. If the police officer were to say to an addiction worker that “this person has committed an offence and needs to be placed before a court”, the reply would presumably comment that the police officer has “missed the point”, that the behaviour is conditioned by a disease that needs to be treated. Each protagonist is correct on their own terms, but communication between the disciplines is difficult, as the statements within each discourse make sense within their own realms. Legal discourse, however, holds a privileged position as it is supported by the power of the state, meaning that legal truth claims have a special status, increasing the likelihood of colonisation of other discourses (Balkin, 2003).

4.6.2 Ideal types of courtroom discourse

Merry (1990), in an ethnographic study of a ‘lower courtroom’ in Eastern Massachusetts, identified three discourses implicated in courtroom interactions: legal, moral and therapeutic. These can be viewed as overarching categories or ideal types or models used to categorise courtroom discourse. Legal discourse is “a discourse of property, of rights” and “of entitlement” where actors attach labels to behaviour such as “harassment”, “trespass” and “assault” (Merry, 1990:112). Moral discourse is “a discourse of relationships” and the “language is of responsibilities” rather than rights (Merry, 1990: 113). Finally, therapeutic discourse implies environmental causes of behaviour and is “drawn from the helping professions” (Merry, 1990: 114). As typologies or models they do not describe the behaviour of courtroom participants in a once and for all manner, whereby actors slavishly follow the same path. Rather, each participant in the courtroom can tactically make statements that imply a discourse and change their

approach depending upon the outcome. Merry (1990) noted, for instance, how judges usually determined cases on legal principles and identified deviations from legal discourse as contributions that inhibited the smooth functioning of the courtroom. However, Merry (1990) noted how sometimes judges would restrict the use of legal discourse for tactical reasons; if a judge believed a complaint did not merit legal adjudication, reliance would be placed upon moral or therapeutic discourse.

As an alternative to the approach of Merry, Conley and O'Barr (1990) identified two courtroom discourses interwoven with the cultural background of litigants; rule and relational discourses. These are represented as two end points on a spectrum; as ideal types appropriate for modelling courtroom discourse. Most courtroom claims were of these types and their usage was not consistent with some litigants strategically switching between discourses. However, Conley and O'Barr (1990) noted how some litigants displayed a preference for one type over another that was consistent with their overall worldview. Relational litigants focused "on status and social relationships" and viewed law as "empowered to assign rewards and punishments according to broad notions of social need and entitlement" (Conley and O'Barr, 1990: 58). Rule orientation, however, disavows status and prioritises specific rules and a belief that "society is a network not of relationships, but of contractual opportunities" that can be accepted or rejected (Conley and O'Barr, 1990: 59).

4.6.3 Discourses, the law and adjudication

Conley and O'Barr outlined differing judicial approaches utilised at different times. These were: "the strict adherent", "the lawmaker", "the authoritative judge", "the mediator" and "the proceduralist" (Conley and O'Barr, 1990: 82). Strict adherents to the law search for abstract legal rules and principles and then apply these to the facts of the case. In contrast to the strict adherent is the law maker who, rather than viewing the law as an external constraint that is binding, sees the law as a resource to be utilised in the search for a fair and just outcome to proceedings. The mediator prefers to avoid the imposition of legal solutions and instead strives to create solutions by agreement of the parties. However, if mediation fails, an authoritative judgment will be entered. Authoritative decision makers also make decisions on the basis of a strict application of law to the facts but are less clear in explaining the source of decisions. As a result, judgments appear to be the result of "personal opinions" rather than from "legal authority" (Conley and O'Barr, 1990: 96). Finally, as the name suggests, proceduralists attach less importance to substantive theories of law or justice (as seen in the actions of the strict adherent or law maker) but rather privilege legal procedure.

4.6.4 The distribution of discourses

The approaches utilised by judges appear to be a reflection of the contextual resources that are brought to bear upon the performance of their duties. Conley

and O'Barr (1990) cautiously¹⁰⁶ suggested that the differing approaches were influenced by social status. Most mediation was said to be initiated by women judges with rule orientation utilised as a last resort, while "proceduralist tendencies" in the judges were to be found "exclusively among legally trained men" (Conley and O'Barr, 1990: 111). A similar process was noted with litigants: women tended towards a relational orientation; men were more likely to be rule orientated; and rule orientation was also a feature of those who operated in business or public service. What is more, the distribution was not value free:

The discourse of relationships is the discourse of those who have not been socialised into the centres of power in our society. Gender, class, and race are deeply entangled with the knowledge of and ability to use the rule-orientated discourse that is the official approach of the law. Thus, it is no surprise that the agenda of relational speakers is often at variance with the agenda of the law (Conley and O'Barr, 1990: 173).

4.6.5 Communication breakdown

Although Conley and O'Barr researched informal civil justice in a US small claims court, their work does provide some valuable insights into the workings of magistrates' courts. Conley and O'Barr questioned how litigant's claims are managed by the legal process and how their concerns are translated into the language of law. While rules of evidence may impact upon the way that testimony is structured within the courtroom, more fundamentally the discourse of law either transforms or ignores "the discourse of the disputants whose problems are the law's very reason for being" (Conley and O'Barr, 1990: 9). If

¹⁰⁶ They noted the difficulty of drawing such conclusions from a spread of five approaches across a sample of 15 judges.

such a process operates in an informal court organised so as to facilitate contributions from one-shot players, it could be expected that the critique applies writ large to the more formal criminal court.

Conley and O'Barr suggested the root of the discord lies in an understanding of the differences between rule and relational orientation; here lies the breakdown in communication either between applicants, or between the court and an applicant. Rule orientation looks for an application of specific rules and norms to the specific situations, whereas relational approaches seek an application of "justice" broadly conceived to the situation. Conley and O'Barr explain the dissonance through a narrative described as "a composite drawn from the experience of hundreds of litigants whose cases we studied" (Conley and O'Barr, 1990: 23). It is worthwhile pausing to consider extracts from the narrative and part of their analysis. Firstly, the narrative:

You bought a new car four months ago. It has 4,500 miles on the odometer. It will not start on rainy days. You go back to the dealer, brandishing your 3-year/50,000 mile bumper-to-bumper warranty. The dealer refuses to fix it under the warranty, claiming that the car needs "ordinary road adjustments." This will cost an estimated \$75-\$100.

You have had enough. You know that there is a court where ordinary people can bring suits without lawyers, technical legal knowledge, or great expense and delay. In your state, this institution is called a small claims court. You decide to sue the dealer for failure to live up to the terms of the warranty.

You take an hour off from your job to go to the courthouse to do the necessary paperwork. The third office you go to is that of the small claims clerk. She hands you a "complaint form" to fill out in triplicate. Under the "Defendant" heading, you are asked to indicate whether the business you are suing is a sole proprietorship, a partnership, or a

corporation. You do not know, and ask the clerk for advice. She responds that she is not allowed to give legal advice, and walks away. Guessing, you check the “corporation” box. Under the heading “Basis of Claim,” you write two sentences explaining why you are suing: “My new car is still under warranty. It won’t start on rainy days, and they want to charge me \$150 to fix it.”

You return to the clerk’s desk and hand her the completed form. She collects \$19 from you. She assigns you a trial date three weeks hence, returns two copies of the complaint form, and says, “Keep one of these for yourself and have the other one served.” You respond, “What does that mean?” The clerk says, “You have to serve the complaint on the defendant. You can have it done by any disinterested person over eighteen, or the sheriff’s office will do it for \$12. Fourth floor, third door on the left off the elevator.”

Being unfamiliar with the niceties of service process, you take the elevator to the fourth floor. You give the papers to the sheriff’s deputy at the desk. She looks at them and says, “Who’s the registered agent of this corporation that we should serve?” You stare at her incredulously, and finally say, “How about if you give the papers to the service manager?” The deputy collects the \$12 from you.

The trial date arrives. Your case is scheduled for 9:30 in the morning, so you have arranged to take your last half-day of personal leave time. You arrive in the courthouse at 9:15 and find the small claims hearing room.

The judge enters the room at 9:40. She is a middle-aged woman in a business suit. She places a name plate in front of her saying that she is a judge. You are struck by the absence of a robe. She begins by calling the names of all the plaintiffs and defendants whose cases are scheduled for this morning’s session. Answering for the car dealer is a young man in a coat and tie. He identifies himself as the financial controller for the dealership.

Your case is fifth on the list. [The Judge] calls your case at 11:20. With a mixture of confidence and trepidation, you walk up and stand at one of two small tables in front of the judge’s desk. She is absorbed in reading papers and does not acknowledge you.

After what seems like several minutes, the judge stops reading and looks directly at you. “May I see the warranty, the bill of sale, the instalment sales contract, and the service

records for the car?" Dumfounded, you stare back at the judge with your mouth slightly open. You finally regain your composure and mutter that you have the warranty, but not the other documents. In fact, you are not really sure what the judge means. The judge says, "Well, this is a contract case, after all, and I can't try it without all the relevant contract documents." You respond, "But I thought this was supposed to be informal." She says, "It is, but it's still a court, and we have to do things according to the law." Ultimately, the judge writes out a list of the necessary documents and explains what she has in mind. She reschedules the case for a week later. The dealer's representative has not said a word.

A week later, you return to court at 9:30, your case is called at 10:40. You have brought all the documents the judge requested. You hand them to her and remain standing, eager to tell your story. However, after reading through the documents the judge turns to the man from the dealership and says, "What do you have to say about this?" He responds, "Well, Your Honour, I hate to bring this up now, but dealers don't give warranties, manufacturers do. The suit should've been brought against the manufacturer. You have to dismiss the case against us." As you look on anxiously, the judge stares down at her desk and shakes her head. Finally she looks up at the dealer's representative and says, "Technically, you might have a point, but you should've said something last week. I'm not gonna let you bring this plaintiff in here twice and then raise a technical defence. We'll try it. If you don't like the result you can appeal and tell them about it in district court".

Before you can say a word, the defendant hands the judge a written report from the dealer's service manager. It says that your car has simply gotten out of tune. It concludes, "There is no defect covered by the warranty. The car needs timing and tuning, which is normal maintenance that the customer is required to pay for." The judge turns back to you and says, "Do you have a report from a mechanic, or did you bring a mechanic to testify on your behalf?"

You are getting angry and struggle to control yourself. You say, "Look, Judge, this is ridiculous. I paid \$12,000 for this car four months ago and it won't go in the rain. I'm

not a mechanic and I don't need one. Common sense tells you that there's something wrong with the car, and the only fair thing is to make them fix it." You sit down.

The judge stares at her desk for another several seconds. Finally she looks up at you. "You have a tough case here without any expert evidence to contradict theirs." Then she looks at the defendant. "But it seems to me that it would be in everyone's interest to get this problem resolved without any further aggravation or bad blood. If I refrain from entering a judgment against your company, would you be willing to try to fix this problem voluntarily?" The dealer's representative responds, "Well, we don't see that we're responsible here, Your Honour, but if that's what you want, we won't go against you."

The judge turns back to you. "I'm going to continue this case for two weeks so you can make an appointment with the dealer and let them try to fix it. If they don't, come back two weeks from today and we'll talk about a judgment. If I don't see you, I'll assume everything is okay and dismiss the case".

A week later, the dealer repairs the car, albeit grudgingly. Finally, after investing \$31 and substantial parts of three working days, you have gotten what you were certain you were entitled to in the first place (Conley and O'Barr 1990: 20-23).

Although this narrative resonates with the a view of law examined earlier¹⁰⁷ as inducing the sense of disorientation so clearly exemplified in the novels of Kafka, it does display the problems that the citizenry face when coming to the law. The claimant here is "eager to tell [her] story", and hopes that "common sense" will prevail and the dealership will repair the car. The plaintiff sees the problem not as the non-performance of a contractual obligation, but as a breakdown in social obligations and relations; this is a new car that does not adequately perform its task. She assumes that the law must have the power to address the obvious refusal of the dealership to perform their social obligation to

¹⁰⁷ See section 4.4.

repair the faltering car. In contrast, the dealership conceptualise the dispute as based on contractual obligations freely settled upon by the relevant parties. Initially the dealership complain that any relevant obligation is owed by the manufacturers and secondly, that the terms of the contract have yet to be breached as the problem appears to be one of “normal maintenance” that is not covered by the contract. The judge in this fictional example utilises four of the differing approaches noted by Conley and O’Barr. Initially she displays a procedural approach by demanding the relevant documents and questioning the plaintiff on the submission of expert evidence. In operating in this manner, the judge is emphasising the procedural regularities that assist the court in its task. This approach is most clearly seen in the comment to the plaintiff that accepts the informal nature of the proceedings but that, “it’s still a court, and we have to do things according to the law”. The judge also evidences a strict adherent approach when identifying the problem for consideration. Although the complainant expresses her complaint in relational terms, the judge explains that this is a contractual dispute that necessitates a determination of the facts (the precise nature of any mechanical problem) and of the terms of the contract (warranty). The judge therefore requests a copy of the contracts and is eager to receive expert evidence from both parties on the nature of the mechanical problem. In addressing the claim that the parties to the contract are the plaintiff and the manufacturers, and not the dealership, the judge expresses law-making tendencies. In order to do justice in this particular case she discards the “technical” submission of the dealer’s representative; she makes it clear that it would be unfair to this plaintiff to halt proceedings and ask her to reinstate proceedings against the manufacturer because this technical argument was not

raised at the previous hearing. The judge displays awareness that her actions disregard legal principle; in stating that the defendant is free to appeal this decision, she implicitly acknowledges that the technical rules are being circumvented in the interests of justice. Finally, the judge disposes of the case through mediation; she suggests a compromise that leads to a solution without having to enter judgment.

The schism evidenced in the fictional example is between plaintiff and defendant, but Conley and O'Barr noted the possibility of discord between judge and litigant. Both judges and litigants could be placed anywhere on the rules-relationships continuum, leading to a number of possible judge-litigant categories of concordance or conflict. Conley and O'Barr reported that the clearest case of concordant orientations occurred when a rule orientated litigant, with a clear legal case, appeared before a rule orientated judge. However, the usual state of affairs was conflict and this frequently took the form of a rule orientated judge and relational plaintiff. This is because litigants, not being trained in the law, do not "learn the law's conventions" in "law school" or via "observations of other legal professionals" (Conley and O'Barr, 1990: 33).¹⁰⁸ Conley and O'Barr pessimistically concluded that, while litigants have their voices heard by the court, the process of transformation silences these voices:

through a process that is remarkable as well as largely unremarked upon, the law selects among these voices, silencing some and transforming others to conform to legal categories and conventions. The more abstract discourse of jurisprudence has only recently begun to recognise the potential relevance of everyday discourse to its

¹⁰⁸ Conley and O'Barr outlined a number of examples that explain this discord further; Mottley's case is a good example (1990 :132-140).

concerns. But this increased attention to voices that historically have been suppressed or ignored has created a new, practical problem: that of finding and hearing them (Conley and O'Barr, 1990: 168).

4.6.6 Legal autopoiesis

One strain of jurisprudence, autopoiesis or systems theory, has attempted to address the issues raised by Conley and O'Barr. Autopoiesis is concerned with how law, as a system of communication, makes legal communications and interprets the communications of other systems. At its basis, autopoietic theory sees law as a system of communication in a society "made up of multiple systems of communication", where "[c]o-ordination is made possible by the use of common reductive terms, self-referential communication, and (at the level of discourse) widely shared values" (Nobles and Shiff, 2001: 200-201). The legal system is described as a "normatively closed" yet "cognitively open" system (Luhmann, 1988: 113). Law is cognitively open in that it is receptive to outside influences; law as a system addresses issues and debates originating from other disciplines and discourses. Law will (and perhaps inevitably) consider(s) problems that are more appropriately addressed by other discourses. For instance, antitrust legal regimes consider economic theories of competition when addressing the problems of anti-competitive behaviour and the market inefficiencies thereby created. In a similar manner, the judges in Conley and O'Barr's research were required, in some instances, to address the wider social issues that litigants brought to the courtroom. However, because the legal system is normatively closed, the engagement with alternative discourses operates in a manner that transforms these other discourses. Alternative discourses are not

merely transplanted into law; rather they are translated into the discourse of law. This is explained as a consequence of the legal system “reproducing itself by legal events and only by legal events” (Luhmann, 1988: 113). The inputs from other systems into the legal system have to be translated into the legal code. Brown (1990) noted how information from social inquiry reports was translated by magistrates into a language that they understood; “the welfare component of reports was translated into control indicators and thus rendered congruent with the disciplinary conventions of the juvenile court” (Brown, 1990: 97). This translation process is not confined to law, but is rather a feature of social systems; “within each system of communication, one can only judge the validity of cognitions – statements about the world – by referring back to the internal procedures of that system which determine the validity of a particular piece of knowledge” (King and Piper, 1990: 22). The law in utilising this abstraction process inevitably reproduces events into a legal/illegal binary structure (Luhmann, 1988). The narratives presented to the law by witnesses, defendants or complainants must be either presented in this form or translated to this form. The legal system, qua a system of *legal* communications, must translate other discourses into legal communications:

For to be clients of the legal system, people have to operate within the system. They have to be aware of a legal problem; have to define their situation accordingly and have to commit themselves to advance legal claims or at least to communicate them. They participate in the legal system using its system-reference to give meaning to their activities (Luhmann, 1988: 111).

Although utilising different language, Conley and O'Barr drew similar conclusions about the translation of narratives by the legal process through the production of a "case" (Conley and O'Barr, 1990: 168). They noted how the translation process leads to a recounting of events that selects legally relevant facts from these narratives in the construction of cases (Conley and O'Barr, 1990). This process is problematic, because when restructuring "life-world" relations in this manner (Habermas, 1988), legal translations will inevitably involve the imposition of violence upon the participants narratives; Merry (1990) particularly commented upon the "paradox of legal entitlement" and noted that while courts may offer remedies to problems that citizens face, to come to the law involves subservience to the categories and categorisations of law.

Translation also suggests an ideology in law that constructs individuals as free autonomous agents able to participate fully in social relations. The law creates the binary legal/illegal opposition in a manner that abstracts legal cases from a wider social context while hiding the ideological basis of the case as a construct:

these conceptions of legal subjectivity express a dogmatic articulation of the image and nature of man and their function in law. In law, human rationality and the concept of a free and autonomous will are the basic repositories of the nature of man (Broekman, 1988: 95).

This process not only operates at an abstract level, where we can glean assumptions on social relations in the operations of law, but also works for the subjects of law – defendants, witnesses, plaintiffs and complainants – who are all legal constructs for the purposes of legal operations. The process of abstraction,

and the imposition of the binary code upon action, necessarily leads to a partial and incomplete framing of subjects before the law. Victims are just that: victims. The person has been reduced to an “artefact” whereby the law deems the relationship of subjugation to the defendant, and the harm caused, as the only relevant details. Legal subjects are:

not real flesh-and-blood people, are not human beings with brains and minds... they are mere constructs, semantic artefacts produced by the legal discourse itself (Teubner, 1989: 741).

For instance, returning to our earlier example,¹⁰⁹ to view the domestic incident as a crime prioritises the legal explanation over alternative explanations and, at the very least, pushes these alternatives to the background if not obliterating them completely. The criminal law, in determining criminal liability for action, is purely concerned with ascertaining whether the defendant committed the prohibited act (*actus reus*), with a blameworthy state of mind (*mens rea*) and is unable to rely upon a legal defence.

4.6.7 Discourse and power

So far, the discussion has concentrated upon the discourses that courtroom participants utilise as contextual resources when performing speech acts within the courtroom. We have seen how Merry (1990) suggested that the act of naming suggests solutions and so therefore operates as an act of power. Similarly, Conley and O’Barr (1990) commented on how judges encounter different discourses

¹⁰⁹ See section 4.6.1.

from litigants and the possibility of discord between the discourse of the judge and litigant. In short, courtroom discourse is interwoven with courtroom power.

4.6.7.1 Foucault and power

The early works of Foucault offer a means of better understanding this interaction between discourse/knowledge and power. It is firstly necessary to understand how Foucault conceptualised power; for him, power does not lie exclusively in the hands of a sovereign body, but is rather all pervasive, inherent in social relations and is bottom up, rather than top down. Power is the “multiplicity of force relations” that form a “chain or system” and are represented in “the strategies in which [force relations] take effect”, “embodied in the state apparatus, in the formation of the law, in the various social hegemonies” (Foucault, 1979: 92-93). This all pervasive power, however, is not something outside of the social world, but instead is interior to that world and helps to constitute social relations and give them meaning. Power is inherent in “economic processes, knowledge relationships, sexual relations” and is the effect “of the divisions, inequalities, and disequilibriums which occur” in these relations and have “a directly productive role” (Foucault, 1979: 94). Power, therefore, helps to *produce* the social world as well as being a product or an effect of already existing relations. More specifically, there is a link between power and knowledge in the construction of the social world and it “is not possible for power to be exercised without knowledge, it is impossible for knowledge not to engender power” (Foucault, 1980: 52). Foucault elaborates on the interplay between power and knowledge many times in his work. For

instance, he has noted on the “manifold relations of power” that “cannot themselves be established nor implemented without the production of a discourse” (Foucault, 1980: 93). Similarly, the relations between power and knowledge are expressed more completely in *Discipline and Punish*:

Taken one by one, most of these techniques [of discipline] have a long history behind them. But what was new, in the eighteenth century, was that, by being combined and generalised, they attained a level at which the formation of knowledge and the increase of power regularly reinforce one another in a circular process. At this point, the disciplines crossed the ‘technological’ threshold. First the hospital, then the school, then, later, the workshop were not simply ‘reordered’ by the disciplines; they became, thanks to them, apparatuses such that any mechanism of objectification could be used in them as an instrument of subjection, and any growth of power could give rise in them to possible branches of knowledge; it was this link, proper to the technological systems, that made possible within the disciplinary element the formation of clinical medicine, psychiatry, child psychology, educational psychology, the rationalisation of labour (Foucault, 1977: 224).

Foucault, therefore, sees the creation of knowledge not as a scientific value-neutral process, but rather as a specific product of space and time. However, this is not to denigrate the positive effects of knowledge production, although there remains scepticism surrounding truth claims. Foucault has specifically commented that power produces knowledge; “[i]t was on the basis of power over the body that a physiological, organic knowledge of it became possible” (Foucault, 1980: 59). The power/knowledge axis has also led to the construction of subjectivity and individuality. Through the scientific and medical gaze and the recording of information, an accumulation of documentation takes place that

constitutes knowledge and the creation of the individual. The examination through the gaze once again leads to the creation of a case that helps to document the person. Each disciplinary gaze operates within a field, and within these fields power/knowledge produces the subject. “The individual, with his identity and characteristics, is the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces” (Foucault, 1980: 74). The individual is one of the “prime effects” of power, “the element of its articulation” (Foucault, 1980: 98). The constitution of the individual is achieved through the examination (Foucault, 1977), and in a legal context, such an examination could take place in the police station, the solicitor’s office or the courtroom.

In these venues, individuals are constituted as defendants; a body of knowledge is deployed to name the individual and their actions. The documents produced assume the position of truth, of a verifiable body of knowledge that demonstrates what happened and what needs to be done. The individual is thus constituted as a defendant through the utilisation of a body of knowledge by the operation of a gaze within a specific field. The individual is constituted as a “case” that “constitutes an object for a branch of knowledge and a hold for a branch of power” (Foucault, 1977: 191). The use of the case legitimises the process of adjudication and reduces the complexity of the social world. The case facilitates the reduction of “messy individuals” to “manipulable elements amenable to bureaucratic processing” while acting as an “ideological function” because “all cases will receive equality of consideration” (Brown, 1991: 106).

4.6.7.2 Discourse and power within the courtroom

Some of the research studies on magistrates' courts have commented, usually indirectly, on the operation of power/knowledge within the courtroom. For instance, Brown (1991) noted how participants struggled to have their version of events accepted as authoritative. The discourses of some players were less likely to be accepted: social workers lacked expertise and their reports were seen as too theoretical, idealistic and "jargon bound" to be of any interest (Brown, 1991); probation officers, on the other hand, were described as more realistic with their reports and recommendations grounded in "common sense" (ibid.).

Brown also noted how the recording of information fixed and captured the defendant. The social inquiry report, in describing the defendant, fixed, captured and constituted the defendant as a construct within the courtroom. The social enquiry report was described as "a set of representations about the defendant which seeks to promote a particular picture of that defendant for a particular purpose" (Brown, 1991: 9). This is not, however, simply a product of the social inquiry report, but rather a result of legal discourse:

From the moment the individual enters the justice system she or he ceases to be a full individual and begins to become something less, a *category* of person about whom only certain 'facts' will be perceived as relevant. Hence the social inquiry report, far from being a description of a real person, *necessarily* displaces him or her through the processes of selectivity (Brown, 1991: 18).

4.6.8 Narrative reproduction within the courtroom

As has been explained, the courtroom is a site of specific discourses and languages where the regular participants feel at ease with these discourses. Law, as a system of rules, as an institution or as a cultural practice, necessarily concerns the manipulation of language: “language penetrates the legal system, and the law perhaps more than any other is a profession of words, ultimately and utterly dependent on some form of linguistic negotiation” (Harris, 1994: 156). On a very basic level, site specific languages can create problems for those not versed in the language, in addition to problems associated with not understanding the rules of procedure, evidence and the informal assumptions concerning courtroom interaction. For instance, when examining the testimony of child witnesses, Brennan noted how children are frequently confused by particular lines of questioning and how their responses – typically ‘I don’t know’ or ‘I can’t remember’ – are misinterpreted so as to question the reliability of the evidence (Brennan, 1994). One participant in the research summarised the confusion encountered in the legal process:

When do you get a chance to say something. I’m only 15 and it’s hard for me to try and match their level of talking when you want to put something across. Some of the words they use, the long words that they might use and they (other children) might not even know the meaning of. And yet they sit there and they don’t tell you and they expect you to answer (Brennan, 1994: 210).

The importance of language in the courtroom is not only to be found in the confusion created when participants are not familiar with the implicit courtroom

conventions; it is also a valuable window into the cultural world of the participants. When courtroom participants perform speech acts they are engaged in a process of production that reflects cultural positioning. For instance, Harris commented on how magistrates' language offers valuable insights into the ideological basis of the legal system and the particular interaction. The courtroom interaction is said to offer a "tangible connection with more abstract concepts inherent in the legal process" (Harris, 1994: 157). This is a proposition that suggests that an examination of courtroom discourse illuminates the ideological assumptions that support and legitimise law.

4.6.8.1 The importance of stories

One method of inspecting courtroom utterances is through an inspection of courtroom narratives. Narrative is a specific language form that carries universal significance in addition to carrying specific value in the legal process. Storytelling is a pervasive cultural activity (Riessman, 1993) whereby we make sense of the world:

Our very definition as human beings is very much bound up in the stories that we tell about our own lives and the world in which we live. We cannot, in our dreams, our daydreams, our ambitious fantasies, avoid the imaginative imposition of form on life (Brooks, 1996: 19).

Narrative is important in the legal context as people come to the law with problems. These problems can be presented as a narrative, with the presenter as the central character; as someone who has been harmed or suffered a violation of

personal interests. A legal audience must listen to these narratives and then sift through them for legally relevant facts while applying the law to these facts. This is the nature of the construction of legal cases. The lawyer must then reconstitute the narrative in the courtroom in a manner appropriate to that particular setting, all the while being aware that an opposing lawyer may be constructing a counter narrative, either on the basis of a different version of events or by interpreting the agreed events in a different manner (Bennett and Feldman, 1981). The courtroom lawyer, in constructing a narrative, has to deal with the contradictions and gaps that appear in our narratives in addition to attributing legal relevance to these events. The courtroom lawyer therefore, “must at once elicit and construct a story, and the distinction between the elicited and construction is by no means clear” (Brooks, 1996: 17). There can be little doubt that courtroom participants are engaged in the process of either constructing or interpreting narratives. This leads to a question of how courtroom participants construct or hear stories.

4.6.8.2 Narrative construction in the courtroom

On a very basic level, stories or narratives recount a series of events with a beginning, middle and an end, and these events are organised into a coherent whole that makes sense and gives events meaning. When we tell stories, we do so to make a point; narratives carry an interpretative force that allow the audience to make sense of the story (Labov, 1977). Narratives are means of recounting events in a meaningful way: a “primary way individuals make sense of experience is by casting it in a narrative form” (Riessman, 1993: 4). For Bennett and Feldman (1981), the story is the means by which lawyers in the

courtroom organise events in a meaningful manner resulting in the story being an almost universal feature of courtroom interaction. Lawyers need to grasp disparate events, illuminate a sense of purpose and motivation within human actions, and gather all these disparate events and motives into an understandable, believable and plausible whole. This is achieved through the narrative (Bennett and Feldman, 1981). For Bennett and Feldman (1981), the success or otherwise of a line of reasoning depends upon how it fits within the overarching narrative that has been constructed and whether or not this narrative is plausible.

4.6.8.3 Narrative (re)construction

We are beginning to see that narrative construction is arguably a universal activity and one that is crucial within the courtroom. However, the act of narrative (re)production is not simply the recounting of experience; narrative performance involves the (re)construction of events and that inevitably invokes a creative process. This involves omitting irrelevant details (“flattening”), exaggerating important points (“sharpening”) and polishing other features of the narrative so as to remove unsuitable material (“rationalisation”) (Cortazzi, 1993: 61). Whenever we tell stories, we do so at different times, to a different audience, to make different points. At each of these different times, the focus of the narrative will change leading to a different emphasis and the removal and addition of details. This process is not merely a reaction to the audience; it is creative whereby reality is readdressed on each telling. Riessman, for instance, noted how some narrative theorists see speech acts (and therefore narrative (re)production) as constituting the world:

Skeptical about a correspondence theory of truth, language is understood as deeply constitutive of reality, not simply a technical device for establishing meaning. Informants' stories do not mirror a world "out there". They are constructed, creatively authored, rhetorical, replete with assumptions, and interpretive (Riessman, 1993: 4-5).

Narratives are created with the assistance of "schemata": "an active organisation of past reactions and past experiences which organises elements of recall into structured wholes" (Cortazzi, 1993: 61). Narratives are organised around a simple structure, that we all implicitly use and acknowledge as a framework when we tell stories. The schemata performs a number of functions that allow for the organisation and recall of information: they represent a "prototypical abstraction" of a concept; they help to organise information through the use of "variables or slots that can be filled" whenever we receive information; they guide "the interpretation of incoming information" so as to help us make sense of the world; and we can fill in the gaps when the "expected information does not appear" (Cortazzi, 1993: 62). In short, "[m]emory load is minimised by stripping away inessential details" and "[o]nly sufficient detail of the original event or story is kept to allow a reconstruction on recall" (Cortazzi, 1993: 62). The use of schemata, therefore, help storytellers to fill in the gaps, they assist in unfolding plots and allow characters to be understood in already existing roles. Complex reality can be flattened into schemata so as to aid memory, the recall of events and the organisation of narratives.

Schemata, in addition to being important in the (re)production of narratives, also assist in the understanding of narratives by audiences. When we hear stories, we

subconsciously attempt to fit characters, their actions and motivations into already existing categories within schemata. When we watch a film, a television programme or read a book, we are tuned to the signals that allow us to assign moral meaning to actions that help us to identify “the good, the bad and the ugly” (Crotazzi, 1993).¹¹⁰ Barthes (1972), for instance, shows how “The World of Wrestling” is not simply a sport, but is akin to “ancient theatre”; the characters are organised around themes that support moral messages within the spectacle. The “excessive gestures” of the participants help the audience identify the characters and their roles:

Each sign in wrestling is therefore endowed with an absolute clarity, since one must always understand everything on the spot. As soon as the adversaries are in the ring, the public is overwhelmed with the obviousness of the roles. As in the theatre, each physical type expresses to excess the part which has been assigned to the contestant (Barthes, 1972: 16-17).

The audience, through the use of such obvious characters with clear characteristics, can see the play of good v. evil or truth v. dishonesty clearly unfold within the spectacle. When observing the characters, already existing schemata assist in the interpretation of events.

The implication for any study of narrative (re)production within the courtroom is that narratives are understood as part of already existing schemata. If a narrative challenges these boundaries, it may meet with either incomprehension or be

¹¹⁰ Narrative reproduction often holds our attention when waiting for the plot twist, the unexpected where the good turn bad or the bad see the error of their ways. Even in these scenarios, the already existing schemata are used to define actions and part of the pleasure is in interpreting the twist and how it fits with these schemata.

interpreted in a manner that coincides with these schemata (Cortazzi, 1993). Bennett and Feldman for instance, noted how narrative acceptance is dependant upon the frames of meaning possessed by those who make fact determinations. Similarly, Bankowski and Mungham (1976*b*) commented on how class can influence the adjudication process; working class jurors are less likely than middle class jurors to accept that legitimate cheap goods are available for sale as this is part of their life experience:

For the middle class juryman it is an incontrovertible fact that men come and offer you bargains and for the working class juryman it is an incontrovertible fact that men steal things. They are both right, for the worlds that are made for them are to an extent at least, different (Bankowski and Mungham, 1976*b*: 121).

The examination of the meaning that audiences place upon stories is closely linked to the work of Van Roermund (1997); this examines what is described as the hierarchy between events and interpretation. The events of the narrative are self explanatory; these are the what happened in a story. The interpretation is the meaning of the narrative or its “discourse” (Van Roermund, 1997: 24). Hierarchy suggests the prioritisation “of one term over the other, in the case Event (E) over Interpretation” (Van Roermund, 1997: 24). Where the event is prioritised over the meaning or interpretation within a story, the meaning is said to originate from an analysis of the events. In other words, when (re)constructing a narrative, we describe the events and then interpret them, the interpretation resulting from the events. To explain this more fully, an example from the natural sciences may illuminate. When conducting an experiment, a scientist is said to operate in controlled conditions so as to lead to the production of results that can be used to

either generate or test theories. Such inductive reasoning presupposes that results lead to the generation of theory, hence the correspondence to narrative (re)production; interpretation (theory) results from events (facts). However, the event/interpretation hierarchy may be inverted to give the interpretation priority. Rather than events suggesting an interpretation; the interpretations (or schemata) influence the selection of relevant events. In short, narrative (re)production reflects individual world views:

According to this presupposition, the narrative can only be understood if one acknowledges that the 'events' referred to are *not* independent of and prior to the Interpretation, but are rather the products of discursive forces, restrictions and requirements (Van Roermund, 1997: 24).

Using the example of the experiment, rather than fact generating or testing theories, it is the theories themselves that suggest experiments and assist in the selection of observable phenomenon as facts.¹¹¹ This takes us back to Riessman (1993) above, and the scepticism surrounding a "correspondence theory of truth".¹¹² Rather than truth being found from observable phenomena, we creatively produce truth from our theories about the world:

our epistemic claims are not picturing reality, it is rather the other way round: reality is a picture of our epistemic claims (to be disguised as power claims rather than truth claims). Thus the pole of Event can be reduced to the pole of Interpretation (Van Roermund, 1997: 32).

¹¹¹ One could go so far as to say that theory suggests what is observed.

¹¹² See p. 141.

For Van Roermund, either hierarchy privileges one pole at the expense of the other in a manner that fails to represent narrative (re)construction; both events and interpretation being crucial for (re)construction. Returning to schemata, Cortazzi (1993) noted how narrative (re)production was a top down and bottom up process whereby the audience constructed meaning from the events and the already existing schemata.

Acceptance of the strong thesis that interpretation is prior to the event, or the weaker compromise that the interpretation is merely influential in (but not prior to) the framing of events, has serious consequences for the (re)construction and interpretation of narratives within the courtroom. This implies a limitation upon the range of courtroom narratives, with those outside of a dominant form either lost or reformulated to fit with dominant conceptions. Alternative narratives may be either dismissed as fanciful, unbelievable or implausible or (re)constructed to fit with already existing schemata that flattens and translates the participant's narrative. Bennett and Feldman (1981) would even go so far as to state that most instances of bias within the courtroom result from narrative interpretation. Rather than blatantly acting on prejudice, courtroom participants are said to discriminate through a rejection of narratives that do not fit with pre-conceived ideas, thereby leading to a rejection of culturally different interpretations:

If legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience, then jurors who come from differing social worlds may disagree about the meaning and plausibility of the same stories (Bennett and Feldman, 1981: 171).

The result of such processes of narrative (re)production is that the narratives that are delivered in court and accepted are constrained by culturally dominant ideologies, ideas and concepts.

4.7 Conclusions

It is hoped that this Chapter has provided a multi-faceted view of courtroom interaction. To understanding courtroom interactions necessitates an analysis of the psychobiography of the participants, the interaction that takes place, the setting of the courtroom and the contextual resources that the participants take to the interaction. While different research studies have prioritised different social domains, there is sufficient theoretically sound evidence to acknowledge the influence of the different domains.

CHAPTER FIVE

METHODS AND METHODOLOGY:

THE GROWTH OF THE RESEARCH PLAN

5.1 Introduction: The organic research project

Research projects are frequently presented in a style that suggests a clear focus, a coherent plan and the execution of that plan. Such a clinical presentation suggests a project whereby every eventuality was contemplated and accounted for in the planning process with nothing left to chance. While this may well be the case for some research projects, it was far from the case for this particular project. A combination of problems and opportunities presented themselves so as to influence heavily the direction of the research process, while the methods used for data collection, as well as being theoretically driven, were also determined by practicalities in the field. In short, the practice of research failed to adhere to a straightforward process and was instead contingent and flexible. In order to capture adequately the dynamics of the process, the presentation of the methods of this project will not be explained in a clinical fashion where every turn appeared to be pre-planned, but rather the narrative of the process will be presented with all the setbacks and new avenues outlined in a manner that adequately reflects the organic nature of research in the social sciences.

However, throughout the research process a number of constants remained. Firstly, the mode of trial decision was always the focus of the research (although

how this was to be examined was subject to amendment). Secondly, this was mostly to be conducted through direct court observation; ready public access to the court site ensured that this would always remain at least a last resort. Finally, it was always the intention to compare the approaches of two courts as utilised by Parker, Cashburn and Turnbull (1981). It was thought that this would enable a comparison between the two different courts so as to check for the influence of local court culture, while the selection of a busy city court and a more stable rural or suburban court would allow for further comparison.

5.2 Research questions

The earlier discussions have raised a plethora of issues that could have formed the basis of any research topic and were at some time or other within the sights of the research. As is the case with the methods used, the questions to be addressed were not identified from the outset and a plan then executed to research these questions; rather the questions addressed changed as the research progressed. Nevertheless, certain fundamentals (including an interest in the practices of the CPS) have remained constant. When more became known about the mode of trial process the issues shifted in response to this knowledge. Similarly, while the theoretical approach developed, this also impacted upon the methods to be used and the questions to be addressed. While the research was initially conceived as an exploration of the mode of trial decision in magistrates' courts, practicalities have narrowed the focus, while theoretical concerns have expanded that focus. The initial discussion in Chapter 2 highlighted the issues in the mode of trial hearing. Four different parties, the prosecution, the magistracy, the defendant and

the defendant's solicitor, can all potentially influence the mode of trial decision. The research examined in Chapters 2 and 3 outlined the intricacies involved in this decision making process and the potential impact of decisions. Much has been made, for instance, of the practices of defendants in electing trial by jury only to plead guilty subsequently. As a lone researcher, many of these issues were out of reach and not all of those within sight could form the basis of one viable research project. As a result, decisions had to be made as to what to include. Throughout the process though, a decision was made to retain a CPS perspective to the research. An interest in the practices of the CPS and the dearth of information available was the initial impetus for the research project.¹¹³ While this was nearly discarded because of access problems it remained a focus for the research.

Initial questions presented the possibility of many methods including the direct observation of courtroom practices, interviewing all four decision makers, tracking cases throughout the court process, simulating courtroom decisions in a manner that probed reasons for decisions and evaluating records on the mode of trial decision. When contemplating the research process, each of these differing methods was considered; practical considerations ruled out some, while theoretical concerns both expanded the questions to be addressed and limited the methods to be used.

¹¹³ The debate between Ashworth and Fionda (1994) and Daw (1994) on the case screening practices of the CPS, the impact of the revised Code for Crown Prosecutors on these practices and the lack of empirical data available to inform this debate led to my first interest in an empirical research project. This initial interest eventually led to a focus upon mode of trial decisions.

5.3 Practical constraints

Practical constraints led to the abandonment of some research questions and associated methods either before the commencement of the fieldwork stage or during the fieldwork process itself. The first data collection method to be abandoned was case tracking. Chapter 2 highlighted a number of problems with the mode of trial decision, including defendants receiving penalties within the powers of magistrates and defendants electing only to plead guilty subsequently. The tracking of cases from the magistrates' court and through the Crown Court may have assisted in explaining the processes that influence pleas and sentence. Unfortunately, case attrition, inevitable when a lone researcher performs a task of this magnitude, would raise serious doubts about the validity of such a project. Having to be in many places at once would result in a lone researcher failing to observe many cases, resulting in either the collection of a partial data set or a set of completed cases so small as to be relatively meaningless. In short, such a task is outside the range of a lone researcher.

Access problems led to a re-evaluation of the project on numerous occasions. The main focus upon the CPS was nearly lost due to problems in gaining access. The first two initial requests for access were refused in different CPS areas. At this time serious consideration was given to the viability of the research project and an alternative focus was considered. Fortunately, as is all too often the case, a personal contact within the administrative staff of the CPS office researched arranged a meeting for the researcher with the Chief Crown Prosecutor for that area. On the basis of this meeting access was provisionally agreed, although

subject to formal approval from CPS Headquarters. After the granting of security clearance, formal access was granted. As is usually reported in methods textbooks, the granting of formal access is only the start of the process. Day to day access and co-operation has to be informally negotiated on a continuing basis and this project was no exception. While the Chief Crown Prosecutor made this process easier through a number of focused introductions to key personnel and a general introduction to others, co-operation was by no means guaranteed. Overall, the time spent in the field was best characterised as harmonious with free and unobstructed access. A desk amongst the legal staff was provided with licence for the researcher to set his own agenda. The only caveat was that consideration should be given to the workload of CPS staff. Most prosecutors and case workers were generous with their available time and eased the acclimatisation process. Even though most prosecutors were sympathetic to the research process and openly co-operated, there were varying degrees to which they donated their time and effort. Some were exceptional, willing to discuss individual cases (before, during and after the court hearing), general policy and their work as a CPS prosecutor. Others were willing, but demands upon their time restricted their generosity. A small minority appeared to be so busy that they were unable to extend co-operation much beyond the acceptance of work shadowing, with little interaction offered during the day as other tasks were engaged upon in any spare time.

These access arrangements led to a number of alterations in the research plans. The first few weeks of the fieldwork period were designed to be an induction, where the researcher would orientate himself with the surroundings, review

decisions as to what was feasible and finalise the data capture methods. Thought was given to the collection of data on prosecutor's reasons for their mode of trial recommendations. While this information was usually available on the file this was frequently brief and of little assistance. Case interviews with prosecutors were contemplated but access problems were identified. While it was quickly apparent that some prosecutors would be free with their time to explore reasons for decisions, others would be virtually impossible to track down for this sort of discussion on a regular basis. This would lead to a skew in the sample, thereby questioning the validity of any data collected. Most importantly, however, the discussions with those prosecutors most willing to give their time suggested that these sorts of interviews would yield little information. Most mode of trial recommendations were seen as mundane and unworthy of discussion. Prosecutors seemed unable to verbalise adequately their reasons and instead suggested decision making was similar to the proverbial elephant; they could not describe it but they would know it when they saw it. Any idea of interviewing prosecutors on individual decisions was therefore rejected as not feasible and unproductive.

Given the problems encountered with gaining the co-operation of some individual CPS prosecutors in the favourable context of being based there, the opportunity constantly to develop working relationships, and the support of the Chief Crown Prosecutor, it was also decided that gaining the co-operation of defence solicitors and defendants was also impractical and probably of limited value. In some respects, defence solicitors seemed even busier at court than prosecutors and clearly would not be available during court hours for

consultation.¹¹⁴ Problems were also identified in requesting interviews of defendants as it was expected that they would simply wish to leave the court premises at the earliest opportunity. Moreover, the focus of the research study for practical and theoretical reasons had to stay with the prosecution. The best method of analysing defence choices would necessitate case tracking, already jettisoned as unfeasible.

The final decision makers, magistrates, were also rejected as possible interview subjects for focused interviews on particular decisions. It was made clear that access would not be granted for work of this sort. Practicalities thereby led to the rejection of case focused interviews as a research method.

General interviews were also rejected both for theoretical and practical reasons. The theoretical reasons will be explored later.¹¹⁵ On a practical level, as explained above, it was doubtful the extent to which worthwhile data could be collected from such a method and the data collection period had extended way past what was expected. After the initial orientation period, data collection was commenced in the Narey administrative courts.¹¹⁶ The initial high frequency of mode of trial hearings in these courts led to some inflated estimations of the number of hearings it would be possible to observe as part of the fieldwork process. A high number of cases were observed in these courts and the

¹¹⁴ Even if some defence solicitors were available, talking to them during court hours would necessitate ceasing direct observation of the courtroom resulting in missed cases.

¹¹⁵ See section 5.3.

¹¹⁶ These “Early First Hearing”, and “Early Administrative Hearing” courts resulted from the Narey Report (Home Office, 1997b) and were part of a number of administrative reforms that were designed to reduce delays within the criminal justice system. Defendants are now expected to appear in court days after charge and in court cases are separated depending upon their characteristics. Expected early guilty pleas for cases that are within the powers of magistrates’ courts are handled by a designated case worker (rather than a CPS prosecutor) while a CPS prosecutor processes all other cases. These courts were, in effect, ‘plea courts’.

observation then moved into the custody courts so as to give a balanced sample. However, most of the business of custody courts consisted of bail applications, whereas the Narey courts contained a relatively high number of mode of trial decisions. It was in the custody courts that long periods of time could be spent observing court business with no mode of trial decisions being taken. This dead time is unavoidable in court observation but resulted in less time being available for alternative methods. Finally, the move to another court site with a general mix of court business and only two days of administrative hearings per week (unusually completed in the morning sitting) further elongated the research process. While such court observation was a necessary part of the process, the early optimistic estimates as to what was possible were unfounded, resulting in a longer fieldwork period than expected. Thankfully, the theoretical approach developed while in the field favoured direct court observation; interviews were therefore deemed to be impractical, methodologically less important (see the next section) and theoretically unnecessary.

When initially considering methods, it was naively assumed that court records would be available on the mode of trial decision and that these would therefore be analysed. Such records were not available and the records taken by the CPS were also problematic. The recording by the CPS of this information was patchy at best with any reasons for the decision not being adequately recorded.

Before an explicit description of the methods actually used, methodological problems need to be addressed, in addition to an examination of the impact of the

theoretical approach on the research question and viability of data collection methods.

5.4 Theoretical expansion and limitation

The theoretical approach to the research developed in Chapter 4 places the mode of trial hearing within the multifaceted context of the setting of the magistrates' court. By highlighting the theory of social domains, Chapter 4 suggests that interaction can be understood on a number of different levels and an appreciation of this expands the research project; a project that was limited to a legal understanding of the mode of trial hearing would focus upon the interplay of different legal factors (and maybe some 'extra-legal' factors) on the mode of trial decision. The theory of social domains suggests that such a legal approach would produce a limited understanding of the interaction. However, while the theoretical approach suggests an expansion in research variables, it also limits the range of viable methods. By focusing upon the interaction as the intersection of the four social domains, this suggests an important role for naturally occurring data. While interviews and simulations may offer justifications for, or after the event rationalisations of, behaviour, they do not evaluate social interaction in situ. In short, the theoretical approach suggested court observation as a method best designed to capture naturally occurring interaction as it happened. Methods of textual analysis would then offer themselves as being appropriate to decode the data within the text such as conversational analysis, discourse analysis or narrative analysis (Coffey and Atkinson, 1996; Silverman, 2000).

5.5 Methodology

5.5.1 Interview data

As has already been highlighted, interviews were not pursued due to practical and methodological considerations. Turning to methodology, within the literature it is possible to discern three different approaches to interview data; positivism, interactionism and ethnomethodology.

Positivism sees the social sciences as akin to the natural sciences. While practical scientific experiments generate facts about the world, positivists see interviews as giving access to the social world. Interviews are seen adequately to describe social facts and beliefs about the world and the interviewee is conceived as an object, a vessel from which the truth can be extracted through skilful interviewing. Interview techniques therefore need to be standardised in order for generalisations to be made from data, and the interviewer must take care to avoid distorting the data gathered or misrepresenting the research object through the operation of internal biases.

Interactionism, meanwhile, focuses upon the interview situation; the interview is regarded as a symbolic interaction between the interviewer and interviewee that can only be understood in the wider context that situates the interview. The interview is a site whereby both participants construct the social world. Interactionism therefore regards interview data, not as a window for viewing (the positivistic approach), but as a joint construction of the actors as influenced by a

wider context. This suggests a degree of relativism to interviews; generalising from interview data may not be appropriate as the interview is only meaningful in the context of the particular interaction leading to problems of reliability. Rather than displaying a concern with these issues, researchers in this tradition emphasise the obtaining of “intersubjective depth” and the mutual understanding of participants (Silverman, 1985: 162). However, the desire to achieve mutual understanding, coupled with validity concerns (such as triangulation), leads an interactionist to acknowledge an approach that sees the interview process as a data collection exercise that can be improved by allowing the interviewee to describe the world in their own terms. This seems to be questionable as consistency would require that the interview data be seen not as giving access to social facts, but rather as a joint product of the particular interaction that constituted the interview.

Ethnomethodology, on the other hand, considers interview data not as a window on the world or as a resource but rather as a topic. This focus is not upon what facts can be gleaned from the interview, nor upon finding the truth, but rather upon how members jointly produce the interview. The interview is important only in so far as it is a different example of how conversational practices are made real. The focus for conversation analysts, for instance, is upon the rules that operate during an interaction. While ethnomethodology displays how conversationalists are constrained by informal rules and expectations and how any interaction is framed by these rules, there are problems associated with this approach. As the focus is upon the achievement by members of the joint construction of an interaction, there can be a loss of focus upon the content of the

interaction (Silverman, 1985). Ethnomethodology fails to observe the influence of social structure on interactions. Instead, ethnomethodologists simply marvel at the achievement of members in the joint construction of conversations.

Interviews can be viewed as both a resource and a topic. They allow access to conversational practices and attest to “the display of cultural particulars expressing variable social practices” (Silverman, 1985: 170). Given the theoretical concerns of this research project and the asserted view of courtroom interaction as a multi-faceted phenomenon, then consistency requires that the interview be seen, not as a window upon the world that helps to provide data about the social world, but rather as a focused interaction that can be viewed from the four different social domains. If the theory of social domains is relevant to interviews as an interaction then this suggests a limited role for the interview. While the product of the interview may well leave traces of the psychology of the participants and the contextual resources that they bring, a more appropriate research method would be one that turned directly to the phenomenon that is the focus of the research; the mode of trial hearing. Rather than relying upon second order descriptions of the mode of trial hearing that may well say more about the circumstances of that particular interaction, a direct focus upon the mode of trial hearing will allow an immediate focus upon how the four social domains influence the courtroom process. This is best done through observation.

5.5.2 Observation

The theory of social domains gives an indication of how the social world of the magistrates' court is imbued with cultural meaning. The observational research technique allows some access to this world. Through an analysis of the language used within the courtroom, it is possible to observe the cultural meanings constructed therein and therefore court culture:

The concept of culture that I espouse is essentially a semiotic one. Believing that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning (Geertz, 1993: 5).

Although Geertz writes within the discipline of anthropology, a conception of culture as “webs of significance” equally attaches to differing social worlds within heterogeneous societies; “the experience of the stranger is not restricted to those moving in a different society” (Hammersley and Atkinson, 1995: 9). Indeed, given the concern with law as a semi-autonomous social system or as a discrete discourse (although linked to other discourses), it is appropriate to view the observer of legal practice as an anthropological stranger. What is therefore required is a qualitative approach in which:

The emphasis is not upon determinism and causality but upon the way in which social meanings, definitions and labels are generated and applied within social interactions and social processes. It is only by grasping the way in which individuals define situations, events and others' actions, and also the way in which such definitions frame and

influence their own and subsequent actions, that we can gain some understanding of how social reality is constructed (Jupp, 1989: 30).

Ethnography lends itself to such an analysis; through the observation of actors within their natural setting an attempt can be made to describe their social world and the means by which actors make sense of that world. Such an approach borrows heavily from interactionist sociology that, as described above, emphasises the constructed nature of the social world. This implies that research should concern the methods by which actors attribute meaning to actions and interpret the world in addition to understanding how members *jointly* construct social spaces, and this in turn leads to a preference for natural settings for the data collection process.

The interactionist movement, however, fails to recognise the socially constructed nature of the research process (Silverman, 1985). There is a distinct unwillingness to apply these theoretical insights gleaned from interactionist sociology to the research process; the adoption of methods triangulation and the belief that research subjects can be captured in their natural setting is evidence of an underlying belief that there is an objective reality – something out there – that can be measured, described and analysed (Silverman, 1985; Hammersley and Atkinson, 1995). The adoption of the initial insights when thinking about research would lead to a different approach to research data:

Truth is a matter of perspective, and perspectives are a byproduct of social interchange or 'discourse'. One's language about the world operates as the lens that construes the

world into something not simply 'out there'. It is an interactive process. The 'observer' and 'observed' are in constant dialogue (Krippner and Winkler, 1996: 159).

In a like manner, Geertz identifies how anthropological writings (and therefore social scientific descriptions of culture) are second order constructions of "other people's constructions of what they and their counterparts are up to" (Geertz, 1993: 9). As a result, he describes these as fictions, "in the sense that they are 'something made'" (ibid: 15). While at first glance this may suggest an apocalyptic vision of research, it is not necessary to abandon the research process; it merely demands that the researcher be both aware of the problem and be constantly reflexive about her work:

In our everyday activities we rely on presuppositions about the world, few of which we have subjected to test, and none of which we could fully test. Most of the time this does not and should not trouble us, and social research is no different from other activities in this respect (Hammersley and Atkinson, 1995: 18).

As much as is possible, researchers should examine the assumptions and presumptions that are brought to the research process; the researcher should always be aware that the process of interpretation is embedded in their socio-historical context. Naturally, there are some presuppositions that are so deeply embedded in culture and so taken for granted that the researcher will overlook them. This is still not a sufficient reason to abandon research; even though absolute objectivity is illusory – otherwise, in the words of Geertz, the researcher would lack culture – the research process still has merit:

I have never been impressed by the argument that, as complete objectivity is impossible in these matters (as of course it is), one might as well let one's sentiments run loose. As Robert Solow has remarked, that is like saying that as a perfectly aseptic environment is impossible, one might as well conduct surgery in a sewer (Geertz, 1993: 30).

Researchers in the interactionist tradition emphasise the use of data and method triangulation so as to gain a fuller picture of the research object. By focusing upon the problem in many different ways, such as direct observation, interviews, surveys etc., the researcher is believed to improve the internal validity of the project by comparing the result of one method with another. For instance, by contrasting interview responses with direct observation in the natural setting, the researcher is able to juxtapose what was said against what happened. This, however, is problematic in that “[u]nderlying this suggestion is, ironically, once more, elements of a positivist frame of reference which assumes a single (undefined) reality and treats accounts as multiple mappings of this reality” (Silverman, 1985: 105). A more consistent approach would be to acknowledge the socially constructed nature of data sets from different methods; each method will therefore only make sense in the context in which it was utilised. But to return to Geertz, this does not mean that the research process should be abandoned, only that the researcher should be reflexive about the methods utilised.

5.6 Methods

As was indicated earlier, the fieldwork process took many twists and turns and finally resulted in a prolonged period of direct observation of mode of trial

hearings. The fieldwork stage was initialised on 6 March 2001 with a short orientation period that mainly consisted of shadowing CPS prosecutors and caseworkers within the magistrates' court. Most magistrates' court work was observed so as to gain an overall impression of the work of a CPS prosecutor. Prosecutors and caseworkers were also shadowed in the local City police station where files were reviewed and prosecutors were on hand to offer early advice to police officers on difficult cases. In total, 12 prosecutors were shadowed in the City Court and 9 in the County magistrates' court. Occasionally, agents would appear on behalf of the prosecution. During the fieldwork process the data capture forms prepared before entry to the field were amended after a short testing period and the final details of the fieldwork process were determined. The final data capture forms are attached as an appendix. The research was always designed to include two different court centres and the final venue allowed for the observation of two courts in one CPS area. The majority of the fieldwork was spent within the City Court; 70 mode of trial hearings were observed in this court.

Initially, the CPS prosecutor was shadowed at the local police station in the morning when she reviewed the files for the Narey hearing conducted that afternoon. This enabled a detailed observation of the review process, an opportunity for informal discussion on the work of the prosecutor and the mode of trial decisions to be observed that afternoon, and a chance to inspect the prosecutors' files for the court hearing that afternoon. Detailed note taking of the prosecution case was therefore possible and also enabled a comparison between the case constructed by the police and that presented in court by the prosecution.

As access was given to the prosecution file, detailed notes were taken on data capture forms with a specific focus upon the witness statements. Additionally, other information was gathered on each case, such as the age of the defendant, the date of offence, arrest and charge, the extent of legal representation, the defendant's ethnic minority, both as it was stated on the file and appeared in court, the offences charged, the date of the first court appearance, the reviewer's comments on the mode of trial decision, any comments that the prosecutor made on the mode of trial decision to the researcher and the defendant's previous convictions. Additionally, the form left space for general comments. A further data capture form was constructed in order to link with this form and record data on the mode of trial hearing. This form recorded the representations of the prosecutor and defence solicitor, as well as recording the date of the court appearance, the plea entered, any decision on mode of trial, whether the victim consented to summary trial (if given the option) and the decision of the magistrate. It also recorded the name of the prosecutor and whether the bench was a lay bench or a District Judge, and if it was a District Judge, his or her name. A daily research diary was also kept to facilitate data collection. The diary was designed to record general observations about the court process and the researchers feelings as to the fieldwork process and overall progress. The diary was particularly important in the early stages of the research when it was utilised to record what were seen as novel features of the courts researched and the thoughts of the researcher on mode of trial and other, more general, topics.

In the early stages of the fieldwork process it was not unusual to observe a high number of mode of trial hearings; the Narey courts were in effect plea courts

with the majority of defendants entering pleas at the first court hearing. Another court was also observed where cases adjourned from the Narey courts were heard. However, all of the administrative courts observed in the early stages of analysis concerned defendants remanded on bail. An important sample of cases was being excluded; custodial remands. As a result, after a sufficient sample of cases were observed in these administrative courts (53),¹¹⁷ the research moved to a custody court. It was initially thought that a similar number of cases would be observed in the custody courts. However, the main focus for these courts was bail applications and as a result there were significantly fewer mode of trial hearings than expected. On more than one occasion, a whole week could be spend observing court business with no mode of trial hearings taking place. As a consequence, this stage of the fieldwork was terminated after the collection of 70 cases in total.¹¹⁸ While there were fewer mode of trial hearings observed with the defendant(s) remanded in custody than initially expected, the original plans would have led to an overrepresentation of defendants in custody, as the vast majority of defendants are granted bail. In total, six months were spent in the City Court.

The next stage was the rather different environment of the County Court. The administrative court met only three times a week and the listed business was expected to be completed in the morning. While this had its advantages – all of the relevant cases were in one court only (there was no split between custody and

¹¹⁷ The initial plan was to observe 50 cases in the administrative bail courts, but on the final day the numbers of cases observed increased the figure to 53.

¹¹⁸ Of the 17 cases observed in the custody courts, two concerned defendants who were remanded on bail rather than in custody. As a result, therefore, the sample of 70 cases consisted of 15 cases where the defendant(s) was remanded in custody and a further 55 where the defendant(s) was remanded on bail.

bail courts) – it was slow going. The administrative courts here dealt with all administrative matters including traffic offences, pre-trial reviews, bail applications and sentencing hearings, in addition to the mode of trial hearing. Once again, mode of trial hearings were infrequently observed. Nevertheless, the fieldwork process resulted in the collection of data on a further 30 mode of trial hearings over a three month period, resulting in a total sample of 100 cases. The fieldwork period was completed on 31 October 2001.

5.7 Analysis

5.7.1 An introduction to narrative analysis

During the fieldwork period it became apparent how administrative hearings, and in particular mode of trial hearings, failed to follow the structural regularities identified by Atkinson and Drew (1979). Atkinson and Drew approached the courtroom process from the perspective of conversation analysis. This led, *inter alia*, to a concern with how adjacency pairs, such as question-answer, operated within the specialist setting of the courtroom. The mode of trial hearing, however, followed a different regularity; the prosecutor delivered what appeared to be a standard statement followed by a brief statement from the defence solicitor¹¹⁹ and a decision by the bench.¹²⁰ This suggested that, not only was the prosecutor's statement the main thrust of the hearing, but this followed a regular pattern, not unlike a narrative. In short, the prosecutor seemed to be telling a highly regulated story.

¹¹⁹ Usually indicating that she had no observations to make.

¹²⁰ This decision was usually presented without the giving of reasons.

This observation resulted in a search for a tool that would adequately examine the narratives delivered by prosecutors. Narrative analysis seemed the ideal answer as it helps to examine “the ways in which social actors produce, represent, and contextualise experience and personal knowledge through narratives and other genres” (Coffey and Atkinson, 1996: 54). Narrative analysis presented itself as a fruitful line of inquiry given that it so clearly correlated with the natural state of the data collected in the mode of trial hearing. In other words, if it appeared that the prosecutor was in the business of telling stories, it made perfect sense to analyse these stories and consider how they reflected the categories and assumptions important to prosecutors.

Narrative analysis also seemed a useful tool for other reasons; most qualitative data is analysed through the use of data coding, resulting in a fragmentation of the data. The selection from qualitative data of discrete episodes is used in the process of theory building and testing. The data set is trawled for similar occurrences that confirm or challenge the theory, thereby leading to constant theory re-evaluation. However, this process removes from view the creative work of human actors involved in the construction of meaningful utterances. The coding of data into theoretical concepts may provide insights into how these reappear throughout the dataset, but this is at the cost of observing how they operate in situ, in the context of the interaction in which they are located. Narrative analysis provides a means by which the oral practices of the courtroom participants can be examined in totality. This is all the more important when it is

acknowledged that the prosecutor's statement is an attempt to influence the court and is constructed as a meaningful whole.

The decision to explore narrative analysis led to the dilemma of selecting an appropriate method of analysis. The most appropriate method for analysing narrative structure seemed to be the evaluation model developed by Labov (1977).¹²¹ Labov suggested that narratives share a number of common features. At their most basic, narratives consist of a sequence of at least two narrative clauses that chronologically describe a series of events. While there must be two narrative clauses at a minimum, it is usual to encounter much more than two. In short, narratives usually have a beginning, middle and end. Next, narratives address a number of potential questions; the substance of any narrative answers these questions before the audience asks them. Finally, a common narrative structure can be identified with different sections performing different tasks and addressing different questions. This evaluation model was selected as the starting point for the data analysis as it appeared to provide a useful entry point into the data. The formal narrative structure developed by Labov was used as an aid to examine the themes and structure of courtroom narratives.

Before a detailed examination of narrative analysis is conducted, it should also be pointed out that this was not the only method by which the data was analysed. The data captured from the fieldwork was also subjected to a mainstream qualitative analysis with the data coded and then compared to see if any general trends could be identified. Additionally, the data was also subjected to a simple

¹²¹ For further methods of evaluating narrative see Cortazzi (1991 and 1993) and Riessman (1993).

quantitative analysis to identify whether there were any obvious trends within the data set. This is explained further in Chapter 6 where the data is analysed in this way.

5.7.2 Narrative structure

Labov suggested six elements that may be present in a narrative; these are presented below. However, while a complete narrative may consist of all six parts to the structure, they are not necessarily required. As explained earlier, all that is required are two narrative clauses.

The Abstract: This is the optional introduction that encapsulates the nub of the narrative. It also creates a space whereby the narrator makes it clear that a narrative will be delivered thereby suspending usual turn taking conversation conventions.

The Orientation: This sets the scene and provides answers to questions such as ‘who’, ‘what’, ‘when’ and ‘where?’

The Complication: This is the main text of the narrative; it addresses the question, ‘what happened?’

The Evaluation: This informs the audience of the rationale of the narrative and addresses the question, ‘so what?’

The Result: This section may precede or follow the evaluation and is intended as an answer to the question, ‘what finally happened?’

The Coda: This informs the audience that the narrative is at an end. Oral narration, as explained above, involves the narrator, through the abstract,

creating the space for storytelling and the suspension of conversation conventions. The coda operates so as to notify the audience that the story has ended and the usual turn taking conventions are reinstated.

Each of these elements is addressed to an, as yet unasked, question. For instance, the evaluation addresses the question, 'so what?' When we tell stories, we do so in order to make a point, address a concern or illustrate an argument. It is clear that narratives need to address this question from the response seen when stories fail to explain their pertinence to the interaction in which they are placed. One just has to think of a social situation where someone tells a story and the audience either misinterpret the thrust of the narrative or fail to understand; it creates a tumbleweed moment where everyone feels the embarrassment of an inappropriate intervention. Good stories avoid such awkward social situations by addressing these questions before they are asked.

So as to illustrate the fit between Labov's evaluation model and the comments from the prosecutor in the mode of trial hearing, what follows is a fictional example of a mode of trial hearing:

Abstract

Prosecutor: Well Sir, as far as mode of trial is concerned the prosecution say that this matter is not suitable for summary trial.

Orientation

Your worships, the complainant and the defendant in this case are strangers and the incident took place outside of Stringfields nightclub. The complainant indicates that she was having a night out with friends and was leaving the club and on her way home.

Complication

She says that the defendant walked up to her and her friends and started shouting. He suddenly lunged towards her and punched her once to the face.

Result

She says she was taken to Cityville General Hospital where she received treatment for a broken nose.

Analysis

Your worships, taking the prosecution case at its highest, they're not known to each other, and of course it's the town centre in a nightclub and we have, on the face of it, unprovoked violence. On balance, albeit that the complainant was struck only once...

Coda

...I would have to suggest that your sentencing powers are insufficient.

Defence Solicitor: No observations your worship.

Chair of the Bench: Very well, we decline jurisdiction.

While this is a fictional example, it is in some respects a typical mode of trial hearing. The prosecutor opens with a very brief abstract pointing out her recommendation. This answers the question, 'what is this all about?' The orientation is also brief; this provides information that allows the events in the narrative to be given some form of context. The complication is the main body of the narrative, and therefore the most important, as it contains the narrative clauses that describe what happened. Narrative clauses, according to Labov, are those that chronologically arrange the series of events that occurred some time in

the past (1977). In other words, this is where the prosecutor describes what was alleged to have taken place. The result follows; this addresses the question, ‘what finally happened?’ In mode of trial hearings for violent offences, the result performs one of the tasks of the evaluation in that the prosecutor, as part of the result, describes the injuries sustained by the victim as a result of the assault. As the level of injury influences the trial venue decision, this information inevitably plays a role in the evaluation of the allegations; hence the evaluative function in the result. Following the result is the evaluation that answers the question, ‘so what?’ The evaluation, similar to other narrative features but at the same time more so, needs to be understood in the context of the narrative performance site; narratives are “situated within a particular interaction and within specific social, cultural and institutional discourses” (Coffey and Atkinson, 1996). The mode of trial hearing is not simply an opportunity for storytelling; the narrative must be embedded within the legal process that is taking place and must therefore be constructed with an eye to the mode of trial decision. The analysis is focusing upon central aspects of what happened; these are the aspects that are important for the legal process. The analysis is therefore an important tool in understanding the cultural categories of the courtroom actors, and in the context of mode of trial decisions, shows the factors that are seen as important in making this decision. Within this example, the prosecutor examines the unprovoked nature of the assault, the relationship (or lack of) between the parties and the fact that the assault took place in the city centre at night. Finally, the narrative ends with a coda where the prosecutor repeats her recommendation.

The vocal contributions of the defence solicitor and the chair of the bench are typically short and to the point; defence solicitors usually remain silent in the mode of trial hearing whilst magistrates rarely give reasons for their decisions.

CHAPTER SIX

“TWO PUNCHES AND A PUSH” IN A “SAUSAGE MACHINE”:

DECIDING VENUE IN THE COURT,

THE LEGAL ASPECTS OF THE DECISION

6.1 Introduction

While much has been said about the importance of both macro and micro sociological explanations in the previous chapters, these approaches must be seen as supplemental to an examination of the legal basis of the decision. The thesis has so far explained the mode of trial hearing (and interactions in general) as multifaceted with many nuances and different levels of depth. One of these levels, for the purposes of the thesis, has to be the legal nature of the decision. Hence we need to be concerned with legally relevant case factors, the “two punches and a push”,¹²² and how these operate with the courtroom or “sausage machine”.¹²³ The legal dynamics of the process will therefore be examined before an analysis of how the different social domains impact upon the process. However, before this work can be presented, we should start with an observation of some general trends in the data, through a brief quantitative analysis.

¹²² One prosecutor openly justified in court the reduction of a section 47 assault to a common assault, on the basis that an assault that consisted of “two punches and a push” should not lead to the possibility of the defendant electing Crown Court trial.

¹²³ Another prosecutor was keen to describe the courtroom, and the legal process, as akin to a “sausage machine”, and placed his work within the context of this metaphor; what others might term conveyor-belt justice.

6.2 Counting the cases

This quantitative analysis will be by no means extensive; the main thrust of the thesis suggests a qualitative approach that captures data in situ. However, while numerical analysis may disguise the nuances to be found in any qualitative analysis, it is still useful to begin with a brief examination of general trends that can help situate the qualitative analysis.

6.2.1 Counting practices

The counting has been completed on the basis of cases. So, where more than one defendant appeared in a mode of trial hearing, if her case was presented as a coherent whole, this has been counted as one case. However, not all mode of trial hearings equate with cases; while some mode of trial hearings concerned multiple offences, these were usually presented as one course of conduct and the court therefore had to make one decision. However, there were cases when the prosecution would present discrete courses of conduct within one mode of trial hearing and request that the bench make separate decisions. These, for obvious reasons, have been analysed as different cases. Finally, there were occasions when the alleged events formed the basis of more than one hearing; either a different defendant could appear in court on different days for the same (joint) offence, or the same defendant could face two mode of trial hearings for the same event if the prosecution amended the charges after the mode of trial hearing. As these hearings in all cases concerned the same alleged events, these were counted as multiple hearings within the same case.

For the purposes of analysis, cases have been grouped together into offence categories, such as, *inter alia*, offences against the person, public order offences or dishonesty offences. However, in making this categorisation, there were some hearings where, for instance, the defendant was charged with an offence against the person and a dishonesty offence. For these cases, it was frequently difficult to make any decision as to whether or not the case belonged to one category rather than another. As a result, such cases have been included in both offence categories; the statistical data therefore has some instances of double, or even treble counting.

When categorising the ethnic origin of defendants, information was gathered from the case file and then later verified by court observation. In some cases, this information would be unclear, as the front file sheet would state one ethnic grouping, while the charge sheet would indicate another. For some cases, this could be resolved in the courtroom by direct observation but this was not always possible. As a result, the ethnic category “other” also includes these unclear cases.

Finally, it is important to note that offences of shop theft were excluded from the sample. It quickly became clear in the initial orientation period that shop theft was treated as a mundane event. Mode of trial decisions for shop theft followed (in all but one case that has been included in the sample) a similar pattern. The following example taken from the research diary shows the routine character of mode of trial hearings for shop theft:

[The pre-prepared plea before venue statement is read in court and the defendant offers a plea of not guilty.]

District Judge: Suitable for summary trial isn't it?

Prosecutor: Suitable for... ...Yes.¹²⁴

As the main thrust of the research concerns the nature of courtroom interaction, there was little need to collect data on such cases; while the mundane character of these hearings offers some theoretical insights, the effort needed to continue collecting such commonplace data was regarded as unnecessary. While this is justified given the nature of the analysis, it does create problems for the initial quantitative analysis that has been conducted. As these cases are invariably deemed suitable for summary trial, there is therefore a bias in the data collected towards more serious cases. However, given the nature of the evidence collected (CCTV and direct observation), most defendants charged with shop theft pleaded guilty; few shop theft cases were therefore excluded from the sample.

6.2.2 Trends

Table 4 provides data on the whole sample, separated into the City and County sample.

¹²⁴ Taken from the fieldwork diary for 22 May 2001.

Table 4: All cases

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement ¹²⁵		Defendant elections ¹²⁶	Magistrates' direction ¹²⁷
All	100	57	57%	43	43%	9	9%	66	66%	96	96%	21%	86%
City	70	44	63%	26	37%	8	11%	52	74%	66	94%	31%	85%
County	30	13	43%	17	57%	1	3%	14	47%	30	100%	6%	93%

The majority of cases in the sample were either deemed too serious for the magistrates' court or the defendant elected. Overall, magistrates decided to retain jurisdiction in only 43 percent of cases, although this figure masks a substantial variation between the City and County Court. In the City Court, the bench accepted jurisdiction in 37 percent of cases compared to 57 percent in the County Court. The combination of not suitable for summary trial decisions and elections resulted in 66 percent of cases in the sample (and 74 percent in the City sample) progressing towards committal proceedings. These figures need to be explained. *Criminal Statistics* for the year 2001 showed that 12 percent of persons proceeded against for either way offences were committed to the Crown Court for trial.¹²⁸ This large discrepancy between official statistics and the research findings is due to a number of different reasons. Firstly, not all cases in the sample where the defendant elected or the magistrates declined jurisdiction would have been committed to the Crown Court. The defendant may have changed their plea before committal proceedings or the case against the defendant may have been discontinued.¹²⁹ Secondly, the sample did not include

¹²⁵ This column, in this Table and all subsequent Tables, shows the proportion of magistrates' decisions that accorded with the recommendation of the prosecutor.

¹²⁶ This column, in this Table and all subsequent Tables, shows the proportion of defendants who were given the option and elected Crown Court trial.

¹²⁷ This column, in this Table and all subsequent Tables, shows the proportion of all cases directed to the Crown Court because the magistrates declined jurisdiction.

¹²⁸ See Table 3 above.

¹²⁹ The institution of the Narey Reforms occurred before the initiation of the fieldwork and these may well have impacted upon the likelihood of cases actually being committed to the Crown Court. A number of prosecutors suggested that the reforms have resulted in committal proceedings being the only real opportunity for thorough review of the case. While Crown

guilty pleas that are the norm for hearings in the magistrates' court.¹³⁰ Finally, the sample excludes shop theft that in most cases would either result in a guilty plea or be deemed suitable for summary trial.

In the sample, the bench made a decision at odds with the prosecution in only four cases and these were all in the City sample. This level of agreement (96 percent) is comparable to that reported by Riley and Vennard (94.2 percent). Interestingly, the bench did not disagree with the recommendation of the prosecutor in any of the County cases. Additionally, three of the four disagreements occurred when the prosecutor made a firm or borderline recommendation that the case was suitable for summary trial only for the bench to decline jurisdiction. Only on one occasion did the bench accept jurisdiction when the prosecutor recommended that the case was not suitable for summary trial. This suggests that, if the bench are to disagree with the recommendation of the prosecutor, they are more willing to decline jurisdiction in the face of a suitable for summary trial recommendation, although care must be taken when drawing such conclusions given the small number of cases involved.

The only other statistic of note in the figures, is the rate of elections in the County sample. Of those defendants given a choice as to jurisdiction, only 6 percent in the County sample elected Crown Court trial. Within the City sample,

Prosecutors acknowledged that theoretically they were placed under an obligation of ongoing review, that is initiated upon receipt of the case, working pressures affect the discharge of this obligation.

¹³⁰ The relevant table in *Criminal Statistics* for 2001 (Home Office, 2002a) (Table 6.2) suggests that out of 993,300 hearings, 82.2 percent (816,500) resulted in a guilty plea. However, cases committed for trial and other outcomes such as discontinued cases are not counted in the 993,300 hearings. Counting these other hearings gives a total of 1,395,800 hearings and guilty pleas are therefore received in 58.5 percent of *all* hearings in the magistrates' courts.

31 percent of all defendants given the option elected Crown Court trial. The final column in Table 4 shows the proportion of cases where the magistrates declined jurisdiction as opposed to the defendant electing (excluding cases where the bench accepted jurisdiction and the defendant consented to summary trial). These figures (86 percent overall, 85 percent for the City sample and 93 percent for the County sample) suggest that the magistrates were heavily responsible for the progression of cases towards committal proceedings. Figures from the CPS for instance, suggested that in 2001-2002, 71 percent of all either way cases were committed to the Crown Court because the bench declined jurisdiction.¹³¹ Hedderman and Moxon (1992) noted a figure of 59 percent while Riley and Vennard (1988) noted 40 percent. This may be explained on the basis that, in attempting to gain a theoretically balanced sample, the research methods resulted in an over collection of serious cases. Time was spent in the custody courts in order to account for a hunch that custody cases would be regarded as more serious than bail cases.¹³² This was largely confirmed in Tables 5 and 6.

Table 5: Defendant on bail

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	79	41	52%	38	48%	8	10%	49	62%	76	96%	21%	84%
City	55	33	60%	22	40%	7	13%	40	73%	52	95%	32%	83%
County	24	8	33%	16	67%	1	4%	9	38%	24	100%	6%	89%

¹³¹ See Table 2 above.

¹³² This was only ever thought to be a rough and ready guide; the requirements at the time for refusing bail (a risk of committing further offences on bail, a risk of witness intimidation and a risk of failing to surrender to bail) are not necessarily linked to offence seriousness.

Table 6: Defendant remanded in custody

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	21	16	76%	5	24%	1	5%	17	81%	20	95%	20%	94%
City	15	11	73%	4	27%	1	7%	12	80%	14	93%	25%	92%
County	6	5	83%	1	17%	-	-	5	83%	6	100%	-	100%

There is a clear difference in the decisions of magistrates between bail and custody cases. Overall, magistrates would decline jurisdiction in 52 percent of bail cases as opposed to 76 percent of custody cases. The greatest differentiation is between bail and custody cases in the County sample. Only 33 percent of bail cases in the County sample were directed to the Crown Court while 83 percent of custody cases were directed to the Crown Court.

Table 5 assists the analysis above on the percentage of cases going to the Crown Court because the magistrate declined jurisdiction. One potential problem highlighted with the sample is the possible preponderance of more serious cases through an over-representation of custody cases. However, for all bail cases, magistrates were responsible for 84 percent of cases that were progressed towards committal proceedings compared to the CPS figures of 71 percent for all cases. Therefore, even the least serious cases display a higher proportion of cases going to the Crown Court on the direction of the bench.

Tables 7 to 10 show the figures from the sample courts divided into ethnic groupings.

Table 7: White defendants

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	66	36	55%	30	45%	6	9%	42	64%	66	100%	20%	86%
City	39	23	59%	16	41%	5	13%	28	72%	39	100%	31%	82%
County	27	13	48%	14	52%	1	4%	14	52%	27	100%	7%	93%

Table 8: Afro-Caribbean defendants

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	9	6	67%	3	33%	-	-	6	67%	8	89%	-	100%
City	7	6	86%	1	14%	-	-	6	86%	6	86%	-	100%
County	2	-	-	2	100%	-	-	-	-	2	100%	-	-

Table 9: Asian defendants¹³³

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
City	18	12	67%	6	33%	2	11%	14	78%	16	89%	33%	86%

Table 10: Defendants whose ethnic origin was either of another category or unclear¹³⁴

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	6	2	33%	4	67%	1	17%	3	50%	6	100%	25%	67%
City	5	2	40%	3	60%	1	20%	3	60%	5	100%	33%	67%
County	1	-	-	1	100%	-	-	-	-	1	100%	-	-

These show that Afro-Caribbean and Asian defendants are more likely to have the bench decline jurisdiction when compared to their white counterparts. While this may evidence the possibility of racial discrimination, it cannot be conclusively established.¹³⁵ No attempt has been made to apply statistical tools, such as multivariate analysis, to these figures to allow for other variables. Firstly,

¹³³ There were no Asian Defendants in the County sample.

¹³⁴ In none of these cases was the defendant white.

¹³⁵ Two earlier studies have suggested that Afro-Caribbean defendants are more likely to have their cases sent to the Crown Court after the bench decline jurisdiction (Brown and Hullin, 1992; Jefferson and Walker, 1992). Unfortunately, both studies failed to account for alternative case features that may have explained the differentiation.

for theoretical reasons the qualitative analysis was the main focus of the research. Secondly, the sheer volume of potentially relevant variables, and the illusive nature of some of these, did not facilitate the use of such statistical analysis. For instance, it is not possible to quantify the influence of some of the contextual resources identified as important in Chapter 4. As a result, the differentiation that is apparent in the figures may well be the result not of discrimination, but of other case factors such as offence seriousness.

Tables 11 and 12 provide a breakdown of cases on the basis of lay benches and District Judges.

Table 11: Lay benches

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	52	30	58%	22	42%	4	8%	34	65%	50	96%	18%	88%
City	25	17	68%	8	32%	3	12%	20	80%	23	92%	38%	85%
County	27	13	48%	14	52%	1	4%	14	52%	27	100%	7%	93%

Table 12: District Judges

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	48	27	56%	21	44%	5	10%	32	67%	46	96%	24%	84%
City	45	27	60%	18	40%	5	11%	32	71%	43	96%	28%	84%
County	3	-	-	3	100%	-	-	-	-	3	100%	-	-

While there is a degree of difference between the decisions of lay justices between the City and County samples, overall the decision-making practices of lay benches and District Judges appears to be similar. Lay benches declined jurisdiction in 58 percent of cases, while District Judges declined jurisdiction in 56 percent of cases. Even removing the County sample from any analysis on the grounds that District Judges were too infrequent an occurrence there to aid

analysis, the respective figures of District Judges directing 60 percent of cases to the Crown Court while lay benches declined jurisdiction in 68 percent of cases, are not too dissimilar. Given the perception that District Judges are tougher than their lay counterparts (Seago et. al., 1995), it is somewhat of a surprise to find that a lay bench is more likely to decline jurisdiction.¹³⁶ However, the evidence could be interpreted as District Judges being more robust and therefore more likely to retain jurisdiction in serious cases.

6.3 Legal factors

The theoretical approach so far developed places the mode of trial hearing within the context of a multifaceted courtroom. However, the mode of trial hearing is part of a legal process. While a pure legal analysis would miss many of the nuances of the interaction, this is not to say that a ‘non-legal’ approach should be privileged; an analysis of the operation of legal processes still has an important part to play in understanding the process.

In addition to a narrative analysis conducted in Chapter 7, the data was also analysed in more a conventional manner. For this qualitative analysis, the data has been subjected to a close reading and coding and from this a number of conceptual categories have been identified. In particular, this has assisted in the identification of recurrent themes and factors within the data set leading to an understanding of the relevant legal factors for the decision. These will be examined by offence category; offences against the person will be examined

¹³⁶ However, once again it has not been possible to account for other case factors.

firstly followed by public order, dishonesty offences, drug, sex, driving, inchoate, possession and preparatory offences, criminal damage, and finally offences against justice.

Before the examination of these factors, two points need to be made. Firstly, the factors referred to are infrequently norms or laws that will necessarily guide behaviour. The process by which prosecutors decide upon venue appears to be more of an art than a science, with hunch playing an important role. The nub of the problem is one of deciding seriousness; while case features may be influential in such a determination, the reality seems to be that intuition plays an important role. For instance, for part of the fieldwork process, the researcher was able to observe the induction of a relatively inexperienced designated caseworker.¹³⁷ While she did have a legal background, she had no relevant experience. As a result, she was being guided in all aspects of the prosecution process including mode of trial. The researcher was party to a conversation where an experienced caseworker described the mode of trial hearing; the new caseworker was struggling to get to grips with the mode of trial decision. The experienced caseworker could do no more than reassure the caseworker that she would “get the hang” of the decision, as it was largely based on intuition and eventually she would “just know”. Secondly, and related to this issue, case factors cannot be determinative of the mode of trial decision due to the presence of a number of different factors in one case. Most factors point to a suitable decision but it is not

¹³⁷ The CPS branch concerned employed three designated caseworkers to present cases in the City magistrates’ court. The third caseworker was employed near the beginning of the fieldwork phase. The two established caseworkers had been with this CPS office for a considerable period and were therefore exceptionally experienced. Whilst some prosecutors would question the appropriateness of the designated caseworker, none questioned the expertise or experience of these two caseworkers.

uncommon for conflicting factors to be present in the same case; as a result of the factors pulling in opposite directions, the prosecutor will simply have to make a 'judgment call' as to the balance of the factors. While some may weigh more than others, the possible presence of a multitude of factors suggests that any one factor will very rarely be absolutely determinative.¹³⁸

Additionally, given the nature of the mode of trial hearing,¹³⁹ most of the data for this analysis largely originates from the representations of the prosecutor. While the prosecutor's recommendations cannot be totally representative of the decision making process of the bench, there are good reasons for accepting their primary importance. Firstly, defence solicitors usually say little when given the opportunity. Most defence solicitors accept the prosecutor's recommendations. This is closely related to the second reason; the bench have to make a decision on the basis that the prosecution can prove their version of events. Defence solicitors therefore have little means of questioning the prosecutor's recommendation. Prosecutors are therefore able to effectively control the information placed before the court and therefore heavily influence the decision making process. As will be seen in Chapter 7, the prosecutor both presents information in a fashion that builds a persuasive case but can also omit or frame the information that is presented so as to support their recommendation. So, whilst it will be too simplistic to state that the decisions of magistrates simply follow the recommendations of the prosecutor, the importance of the prosecutor, combined with the high correlation between the recommendations of the prosecutor and the decisions of the bench, suggest that an adequate

¹³⁸ Additionally, the sociological influences upon behaviour may well pull in different directions.

¹³⁹ For more on this point, see Chapter 7.

understanding of the bench’s decision can be gleaned from the observations of the prosecutor.

6.3.1 Offences against the person (OAP)

Table 13 outlines those cases in the sample classified as offences against the person.

Table 13: Offences against the person

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	37	22	59%	15	41%	4	11%	26	70%	36	97%	27%	85%
City	31	19	61%	12	39%	4	13%	23	74%	30	97%	33%	83%
County	6	3	50%	3	50%	-	-	3	50%	6	100%	-	100%

The offences against the person sample has a similar statistical profile to that for the sample as a whole. A small majority of cases are directed to the Crown Court by the bench, and the magistrates’ direction makes by far the largest contribution to all cases that are sent to the Crown Court.

The offences against the person cases in the sample ranged from assaults occasioning actual bodily harm, section 20 assaults of inflicting grievous bodily harm, through making threats to kill, to harassment offences. Analysis showed a multiplicity of factors that were highlighted at some point as influencing the prosecutor’s recommendation: the injuries caused; the modus operandi or method of assault; the relationship between the parties; the location and scene; legal factors; the characteristics of the victim; the existence of any provocation; and the existence of racial abuse.

6.3.1.1 OAP: Injuries caused

The degree of any injuries caused is an important consideration when assessing mode of trial for offences against the person. Assaults are defined partly in relation to the harm that the defendant is alleged to have caused the complainant, with grievous bodily harm for instance defined as really serious harm.¹⁴⁰ The more serious the injuries, the higher up the scale of assault offences the possible charge. However, while the injuries caused are important, occasionally other considerations help to determine venue.¹⁴¹

For section 20 assaults, the injuries caused in these cases ranged from the almost ubiquitous bruises to more serious injuries such as cuts requiring stitches, broken bones, and a fractured skull. For these cases, it was difficult to assess whether or not the injuries were the determining factor; nearly all case features referred to by prosecutors were described as aggravating the assault, and there appears to be a rule of thumb that section 20 assaults will be deemed not suitable for summary trial. In most cases the injuries sustained by the victim were usually taken for granted as being serious; the prosecutor did not highlight these as being a cause for concern. We can see a good example of this in case 2:

Prosecutor: As far as mode of trial is concerned, the prosecution will suggest to you that this is not suitable to be dealt with here and ought to go to the Crown Court. It's an allegation of a nightclub assault, where it's said the defendant struck the complainant

¹⁴⁰ *D.P.P. v. Smith* [1961] A.C. 290.

¹⁴¹ While the Mode of Trial Guidelines refer to serious injury, they suggest that cases of injury caused by use of a weapon, or more than minor injury caused by kicking or head butting, are those that should be directed to the Crown Court.

with a bottle to his head, requiring cuts, four stitches. In all those circumstances your sentencing powers are not sufficient.

Unlike other cases the prosecutor actually failed to explain the relevance of such case features; it is almost as if the case speaks for itself. This case is typical of a number where the mode of trial decision is seen as axiomatic.

In one case, the prosecutor made specific reference to the injuries caused as being determinative of venue. In case 33, the prosecutor initially suggested that the complainant sustained cuts and broken bones in his fingers and wrist as a result of the alleged assault. The defence solicitor, drawing upon a number of ambiguities within the prosecution case as described in the advance disclosure, questioned whether the broken bones were self-induced as a result of striking a wall. The chair of the bench unsurprisingly requested clarification and the prosecutor then reinforced the recommendation, on the basis that the head wound caused by the initial blow from the defendant was itself sufficient to justify the recommendation that the case was not suitable for summary trial. The bench accepted this alternative basis for the recommendation and declined jurisdiction.

Two cases in the section 20 sample suggest that while injuries may be important, there is an expectation that section 20 cases are so serious that they should be simply sent to the Crown Court, these being cases 9 and 55.¹⁴² In case 9, there was a degree of ambiguity as to the injury caused by the alleged assault. There was a suggestion that the victim suffered from a fractured skull, yet the

¹⁴² All of the section 20 assaults in the sample were directed to the Crown Court; this, coupled with the expectation displayed in the cases that the case will inevitably be so directed, questions the categorisation of these assaults as triable either way.

prosecutor was unable to confirm this through medical evidence. All that the prosecutor could safely say was the complainant suffered from a head injury and had received the standard advice appropriate in such cases from the local hospital. Nevertheless, the prosecutor recommended the bench decline jurisdiction:

Prosecutor: There was some question of a fractured skull but I don't have any medical evidence to say that it was fractured, so it may well be that it was a suspected fractured skull but wasn't actually fractured. But Sir, nevertheless it was the vulnerability of the victim here, two onto one, punching. In that situation that's not suitable for this court Sir.

This raises two issues; if the medical evidence is ambiguous on the injuries received, the charge may be inappropriate. More importantly for the thesis, while the aggravating features in this case may be serious, it could be doubted if they actually justified the recommendation made. Perhaps the recommendation, and therefore the decision, was simply made on the basis that section 20 offences are too serious for the magistrates' court.

Case 55 also deals with a situation where the prosecution was unsure as to the medical basis of the evidence. In the hearing, the prosecutor stated that the *victim said* he suffered a fractured cheekbone.¹⁴³ Given the ambiguity in the prosecutor's statement,¹⁴⁴ the defence solicitor unsurprisingly used this to add doubt about the extent of the injuries. He lamented the lack of medical evidence

¹⁴³ The prosecutor also refers to alternative aggravating features: a group assault, the defendant was trespassing, the victim was at his place of work, and was asking the defendant to leave.

¹⁴⁴ The use of the linguistic device, 'the victim says', operates so as to distance the prosecutor from the statement of the victim.

and questioned the appropriateness of conducting the mode of trial hearing without this evidence.¹⁴⁵ The District Judge failed to act upon this ambiguity:

District Judge: if it can be proved against you, that you were involved, as is alleged, on educational premises in this kind of assault, *causing the injury that you did*, to a member of staff without provocation, that is a case likely to proceed, that is if you were convicted, a sentence beyond the powers of this court to give.¹⁴⁶

While the District Judge was clear when declining jurisdiction, it is interesting how little is made of these cases where the prosecution accept they cannot be sure as to the extent of the victim's injuries. In one sense, these are simple manifestations of the assumption that the prosecution can prove what is alleged. However, as the prosecution are unsure, the lack of effective challenge to their position suggests that section 20 assaults are simply too serious for the magistrates' court.

For assaults that occasion actual bodily harm, the injury inflicted is a fair predictor of venue. In most cases with no significant injury, such as minor cuts, bruising, swelling or grazing, chipped teeth and "pain", the court retains jurisdiction, while broken bones (including a broken nose), cuts requiring stitches and puncture marks caused by biting normally result in Crown Court trial. A trip to hospital does not seem to be a determining factor. Outside of these general considerations, a number of cases are worthy of further consideration.

¹⁴⁵ Prosecutors usually rely upon medical statements when describing serious injuries to the court; to that end, they normally seek an adjournment so as to gain this evidence.

¹⁴⁶ Emphasis added.

In case 39, the injuries received were bruising to the cheek, tenderness to the bone, pain to the left side of the head and a cut to the forehead. These usually led to a recommendation that the case was suitable for summary trial but due to an allegation of head butting, the prosecutor recommended Crown Court trial. The legal adviser made it clear to the un-represented defendant that this factor usually results in a recommendation for Crown Court trial. The manner of the assault was therefore seen as much more important than the injuries caused.¹⁴⁷ Similarly, in case 28, minor cuts were deemed to be too serious as they were the result of a “glassing”, while an assault against a police officer who received minor injuries, was still directed to the Crown Court due to the racial aspect of the assault and the fact that this was an allegation against a public servant (case 48).

In case 86, the victim suffered what was described in court as a one-inch cut to the head; nevertheless the court still accepted jurisdiction. This case is a useful comparison to cases 9 and 55 analysed above as part of the section 20 sample. In case 86, the defence solicitor was able successfully to cast doubt on the extent of the injuries sustained:¹⁴⁸

Defence Solicitor: this is a three and a half page statement which goes into some detail.

Had she had stitches, I would have assumed that quite properly that any decent police officer would have put that in the statement.

Similarly, in case 62, the lack of medical evidence was seen as important. Here, a police officer that attended the scene, reported how the complainant’s cheek had

¹⁴⁷ The Mode of Trial Guidelines suggest that only head butting that results in more than minor injury should be committed to the Crown Court.

¹⁴⁸ This built upon the ambiguity inherent in the prosecutor’s borderline suitable for summary trial recommendation.

swollen to the ‘size of a tennis ball’. However, the lack of medical evidence pointed towards summary trial:

Prosecutor: Sir, given the nature of the injury and there is no medical evidence to say why it was so swollen, simply that it was, I would say that this could be dealt with in this court.

The lack of medical evidence however, was not important in case 62. Here, the defendant assaulted two women, one of whom was pregnant. The medical evidence was unclear as to whether or not the assault *caused* a problem with the pregnancy, yet the prosecutor still used this as a basis for a not suitable for summary trial recommendation:

Prosecutor: there was an abnormality found but we don’t know if that is linked to the kick but nevertheless, vulnerable victim, take your victim as you find them.

For charges of harassment or making threats to kill, concerns other than injuries are usually at the forefront of the court’s consideration. Even though these offences are best defined as offences against the person, the interests that are protected relate to the security of the individual rather than their physical integrity.¹⁴⁹ Nevertheless, the prosecutors in two cases made reference to the injuries received by the complainant. For instance, in case 47, the prosecutor supported the recommendation that the case was suitable for summary trial by highlighting that the punch thrown caused “soreness but happily no bruise or mark or lasting injury”. The reference to injury in case 64, a harassment case,

¹⁴⁹ However, in some harassment cases the conduct that forms the basis of the allegation involves a direct attack upon the physical integrity of the complainant.

was to psychological injury, and it reinforced the totality of the course of conduct alleged by the complainant. No one incident in the case was seen as so serious that it justified Crown Court trial, yet judged together, the history of the course of conduct was serious. By stating that the complainant's "psychological well-being is *severely* affected", even though, "there does not appear to be any lasting physical harm",¹⁵⁰ the prosecutor was helping to reinforce the totality of the conduct alleged against the defendant.

6.3.1.2 OAP: Modus operandi

Whenever a feature was highlighted, in the section 20 sample, its effect was usually to suggest that the case was too serious for summary trial. However, in case 55, the prosecutor highlighted that the manner of the assault was not too serious: "so Sir, whilst the injury has been caused by punching rather than being caused by any sort of weapon, kicking etc.", other features make the case too serious for the magistrates' court. Nevertheless, the District Judge, in declining jurisdiction, commented, *inter alia*, on the "kind of assault" perpetrated by the defendant despite the recommendation of the prosecutor.

Despite this anomalous decision, the manner of the assault has to play an important part in the mode of trial decision. The Mode of Trial Guidelines refer to the use of a weapon that is likely to cause, or actually causes, serious harm. Also, the injuries sustained for serious assaults are frequently a product of the manner of the assault. For instance, in case 9, whilst there was a degree of

¹⁵⁰ Emphasis added.

ambiguity as to whether or not the complainant had suffered a fractured skull, the prosecutor was still able to rely upon the manner of assault as a reason for declining jurisdiction. Case 59 also shows the importance of the defendant's modus operandi. Here, the defendant was alleged to have walked towards the complainant, who was holding his ankle,¹⁵¹ "and then without warning kicked the complainant violently and deliberately in the face with his right foot". By focusing upon the "violent and deliberate" actions of the defendant, the prosecutor performed two functions; she described the culpability of the defendant and the clear intention that lay behind his action and she evaluated the manner of the assault. The phrase used gives a clear indication of how the prosecutor viewed the manner of the assault and the actions of the defendant.¹⁵²

For most cases, the prosecutor failed to elaborate upon the manner of the assault other than to describe the incident; in these cases the facts are to some extent expected to speak for themselves. For instance, the prosecutor may simply describe how the defendant struck the complainant on the head with a bottle (case 36), causing cuts (case 2), or that the defendant used a police baton to strike the complainant on the head (case 45) and finally how the incident was a "knife attack", resulting in the complainant receiving six stitches (case 71). In all of these cases, the prosecutor assumed that the facts clearly pointed to Crown Court trial, to the extent that nothing more needed to be said. In this sample of section 20 cases, only in case 35 did the prosecutor clearly evaluate the alleged actions of the defendant where the prosecutor described the head butting, repeated

¹⁵¹ The complainant had just been tackled in a football match.

¹⁵² It must be stated, however, that the injuries received – a fractured jaw – clearly made the case unsuitable for the magistrates' court.

kicking and banging the complainant's head against the wall as aggravating features.

For the sample of cases where the defendant was charged with assault occasioning actual bodily harm, the manner of the assault was not decisive. There was a whole multitude of different activities that formed the basis of allegations: attempted strangulation, biting, pulling out earrings, head butting, punching, and "glassing". For some cases, the manner of the assault was all-important. So, while the complainant in case 28 sustained injuries that were "not severe", the use of a glass as a weapon aggravated the allegations. Similarly, the use of a hammer to hit the complainant over the head in case 58 also resulted in a serious view of the case and the bench declined jurisdiction.

Yet a serious assault may not necessarily result in the bench declining jurisdiction. For instance, in case 86, the defence solicitor successfully built upon a degree of ambiguity in the prosecutor statement. Initially, the prosecutor commented upon the assault that consisted of the defendant using "a heavy glass ashtray", as being serious and "the fact that a weapon was involved" may have led to a conclusion that the case was too serious for the magistrates' court. The later acceptance that this was a solitary blow, was developed by the defence solicitor:

Defence Solicitor: So far as this ashtray is concerned, this is a single incident, it's not repeated, it's not somebody literally banging away with an ashtray; it's a single incident as far as that matter is concerned.

The bench accepted jurisdiction in this case. The greatest degree of ambiguity surrounds cases where the defendant was alleged to have bitten the complainant. So, in case 38 the court declined jurisdiction, while in cases 3 and 17 the bench retained the cases. In case 38, the prosecutor described the defendant as using the “teeth as a weapon”, that caused, “two puncture marks that drew blood”. However, in case 3, the bite simply caused a “nasty mark” and in case 17 the skin was not broken. On the face of it, for these cases, the lack of serious injury seemed to be the defining characteristic. However, as we have seen above, if the manner of the assault was serious, the lack of any injury is not determinative of venue. More importantly, these two cases were both allegations of domestic violence and, as we shall see later, these raise discrete issues.¹⁵³

For harassment cases, case 64 shows how the defendant’s modus operandi can be seen to be all important, as here no one incident was so serious as to justify Crown Court trial. The prosecutor described an incident where the defendant was alleged to have attempted to drag the complainant from a car, There were other allegations of physical and verbal violence, as well as an incident of criminal damage. The key to this case, however, was the totality of the conduct; in order to convey the gravity of the defendant’s conduct, the prosecutor waved a bundle of statements at the bench and stated, “Sir, as you can see, the bundle of statements is quite substantial”.¹⁵⁴ Such an accumulation of evidence was not relied upon in case 47, where the prosecutor only made reference to three relatively minor and separate incidents when making the recommendation that the case was suitable for summary trial. In addition to these two harassment

¹⁵³ See section 7.3.6.

¹⁵⁴ This may also suggest that the case was too complex for the magistrates’ court.

cases, the defendant was also charged with harassment in case 51, where the allegation concerned the use of a knife in making threats. However, as this case is another of domestic violence, this will be analysed later. Case 67, an allegation of making threats to kill, raises similar issues of domestic violence that will be considered later. Cases 1 and 8 also concern allegations of making threats to kill, and here the fact that there was a “simple” allegation of making threats, with no associated violence, resulted in the court retaining jurisdiction. Yet, even in cases 83 and 89, where the threats took place in the context of incidents that were also charged as common assaults, the bench accepted jurisdiction. By comparison, in case 91, threats to kill combined with the possession of an offensive weapon (a circular saw and a knife) were seen as too serious for the magistrates’ court.

6.3.1.3 OAP: Relationship between the parties

Incidents of domestic violence in the sample dealt with such complex issues that they are worthy of examination in a discrete part of the thesis. This relationship between the defendant and complainant will therefore be examined later.¹⁵⁵ Nevertheless, there are other categories of relationship that can be examined now. Only very rarely did the prosecutor refer to the relationship between the parties as an important consideration used to evaluate the incident; it was usually nothing more than a passing reference. For instance, while in case 42 the prosecutor made reference to some relationship between the parties, this was only to say that, “this defendant and the victim are known to each other”.

¹⁵⁵ See section 7.6.3.

Similarly, in case 61, the prosecutor referred, in passing, to “previous trouble” between the parties.¹⁵⁶

6.3.1.4 OAP: Location and scene

Within the section 20 offences sample, two offences (cases 2 and 36) were alleged to have been committed in or around a nightclub. This was regarded as a local problem within this CPS area and prosecutors, both in and out of court, frequently noted how a “city centre night time incident” in or around licensed premises would be seen as aggravating the offence. However, in both these cases the prosecutor did not specifically target this case feature as aggravating the alleged offence.

The assault occasioning actual bodily harm sample gives a greater indication as to the importance of this factor. For instance, while in case 25 the prosecutor referred to the incident as “night time city centre violence”, and highlighted this as an aggravating feature, the case as a whole was still seen as suitable for summary trial. Similarly, in case 90, the prosecutor referred to the assault outside licensed premises as problematic:

Prosecutor: Obviously, that will be of concern to you because it is actually a public place and obviously, there is a suggestion to you also that perhaps alcohol may have played a factor in this.

¹⁵⁶ The defendant had previously been ejected from the complainant’s breakers yard due to an alleged incident of disorder.

Nevertheless, as this was described as a single blow, the bench retained jurisdiction. Within this sample, other factors that related to the scene of crime were also described by prosecutors as important yet failed to impact upon decisions.

There is much said by prosecutors about incidents that take place with children present. So for instance, within the first few weeks of the fieldwork process, a prosecutor commented (when reviewing the file) upon a case where children were present as being particularly serious. She went so far as to ask the rhetorical question, how could parents behave in this manner in front of their children, with an associated comment on how this must be distressing for the children. Yet, in the cases where a child did witness the assault (cases 17 and 67, where the presence of the child was specifically described as an aggravating feature and 1, 18 and 47), the prosecution still recommended that the bench accept jurisdiction. Indeed, reading into the text of the hearing of case 17, it is apparent that the parents were actually fighting over the custody of the child.¹⁵⁷ While the prosecutor in case 91 made reference to a 10 year old child who witnessed the allegations, the court probably decided that the case was not suitable for summary trial on the basis that the defendant made threats to kill while in the possession of an offensive weapon.

If victims were assaulted by defendants in their own home, then it would be expected that this would be seen as an aggravating feature. In two cases in the actual bodily harm sample the defendant did just that – cases 3 and 17 – and in

¹⁵⁷ For some of these cases, the fact that they were incidents of domestic violence no doubt played a part in any decision.

case 3, the prosecutor specifically referred to this as an aggravating feature. However, in both these domestic violence cases, the bench accepted the prosecution's recommendation that the case was suitable for summary trial.

6.3.1.5 OAP: Legal factors

Legal considerations usually relate to any likely sentence. Frequently, prosecutors referred to the possible sentence as being a reason for their recommendation. This was usually nothing more than a simple remark used as a conclusion to the observations. It encapsulated the thought that taking the case as a whole, it was either too serious for the magistrates' court or suitable for summary trial. However, on occasions, the prosecutor made a reference to the likely sentence that was more meaningful than this type of observation. For instance, in case 17, the prosecutor made the following observation in support of the suitable for summary trial recommendation:

Prosecutor: six months can reflect the fact that you haven't committed him, say if he were to plead guilty, you haven't committed him to the Crown Court for sentence.

This statement is linked to the sentence discount for pleading guilty; if the defendant pleads guilty at the earliest opportunity there is the possibility of a one-third discount on sentence. On that basis, a defendant who pleads guilty sufficiently early and might otherwise have received the six months maximum sentence that could be imposed in the magistrates' court, could have the sentence reduced to four months. The prosecutor in case 17 is suggesting, however, that even a sentence of six months could reflect the sentence discount; the discount

would therefore consist of a refusal to decline jurisdiction and initiate committal proceedings to the Crown Court where a sentence of more than six months would be available. However, if the defendant maintained innocence and was then convicted, the court would still have had the opportunity to commit to the Crown Court for sentence.¹⁵⁸ The prosecutor in case 18 canvassed the observation that committal for sentence remained an option:

Prosecutor: this is a matter which this court could try if convicted on a full facts version and commit the defendant for sentence.

Here, the prosecutor, in addition to reminding the court of its procedural powers, made an implied reference to one of the assumptions of the mode of trial hearing. The bench is to make its decision on the basis that the prosecution can prove what is alleged. However, in some cases the defendant may subsequently be convicted, but the prosecution will only be able to prove a less serious account, thereby resulting in a lower sentence. The implication in the prosecutor's recommendation may well be that, although on the prosecution's version the magistrates' sentencing powers would be insufficient, it is possible (or likely) that the defendant will be convicted on the basis of a less serious version of events.¹⁵⁹

On some occasions, the defence solicitor made it known that the defendant would elect Crown Court trial regardless of the decision on venue. In such cases,

¹⁵⁸ The possibility of committal for sentence is also referred to in the Mode of Trial Guidelines. When the Criminal Justice Act 2003 is implemented this power will be lost.

¹⁵⁹ Interestingly, both these cases are incidents of domestic violence and the prosecutors in both cases utilised a number of different approaches that were aimed at keeping the cases in the magistrates' court.

the bench approached their decision on the facts as presented by the prosecution and ignored the indication of election. It has been suggested that the bench in such a situation may well decline jurisdiction so that “the procedures could be speeded up” (Hedderman and Moxon, 1992: 16). However, this did not occur in case 3 after the prosecution made a recommendation that the case was a borderline decision and the defence solicitor indicated that the defendant would elect. The legal adviser reminded the bench of the need to consider venue without this information and the bench therefore accepted jurisdiction.

In the threats to kill sample, we can see in case 91 how a previous hearing in effect constrained the bench. There were two hearings for this case because the prosecutor amended the charges prior to committal proceedings. The prosecutor indicated that effectively the bench’s hands were tied:

Prosecutor: the fact that there are new charges of affray, as an alternative to a possession of an offensive weapon and threats to kill, clearly makes no, little difference to where this matter should be dealt with.

The legal adviser in this case also reminded the bench of its power to commit for sentence.

Another case worthy of examination in this section is case 64, the harassment offence dealt with above. So as to help indicate the totality of the course of conduct perpetrated by the defendant, in addition to waving the bundle of statements at the bench, the prosecutor also made reference to the involvement of the civil courts:

Prosecutor: There is also County Court involvement and injunctions to keep the defendant from her.

This statement had two effects. Firstly, it made it clear that one of the possible problems with domestic violence cases – the possibility of withdrawal – was not an issue here, because the complainant had already displayed a willingness to persevere with the legal process. Secondly, it was a call for a severe intervention by the legal process; the civil law had failed sufficiently to address the problem, therefore greater steps had to be taken.

The final legal consideration (and in some respects the most important) is the charge; while this is obviously important in the context of whether or not a section 20 or section 47 assault is charged, the borderline between common assault and battery, and assaults occasioning actual bodily harm is also important. If the prosecutor chose a common assault charge, this removed from consideration the option of Crown Court trial. Prosecutors do sometimes charge summary only offences as alternatives to triable either way offences so as to keep these within the magistrates' court.¹⁶⁰ Prosecutors view these cases as unworthy of Crown Court trial and so therefore remove the option. For instance, the prosecutor in case 61 openly canvassed this as a possibility at the review stage, but felt unable to do this as the injuries (facial swelling the size of a tennis ball)

¹⁶⁰ It is difficult to state with any accuracy the extent of this practice. At the review stage, some prosecutors were open with their use of such charging practices. One prosecutor even went so far as to explain his approach at both ends of the triable either way category. He preferred less serious either way offences to be charged as summary only, to remove the possibility of election, and for the most serious either way cases he preferred indictable only charges, so that the case would be sent to the Crown Court within a week and "they could sort it out there".

were such that only a charge of assault occasioning actual bodily harm would suffice.

6.3.1.6 OAP: Characteristics of the victim

The Mode of Trial Guidelines refer to attacks upon vulnerable victims or upon public servants in the course of their employment as aggravating features. In two cases in the section 20 sample, the prosecutor specifically referred to victim characteristics as aggravating the assault; in case 9, the prosecutor referred to the vulnerability of the victim as an important factor,¹⁶¹ while in case 55, the prosecution referred, *inter alia*, to the fact that the victim was working as a college groundsman at the time of the assault, and the incident took place when the victim was at work and attempting to remove the defendant and others from the premises. In case 9, the prosecutor also pointed out the frailty of the victim; he was 65 at the time of the alleged incident, had endured two heart attacks, suffered from angina and diabetes, and had cataracts.

It might have been thought that if the victims were children, this would aggravate the offence. While this is a relevant consideration, this does not necessarily result in Crown Court trial. So, in case 8, the defendant was charged with making threats to kill to two children (aged 11 and 12) who were throwing stones outside his house. So, while the District Judge enquired as to the age of the children, he also wanted to confirm if this was “merely verbal abuse”. Upon this confirmation, the District Judge accepted jurisdiction.

¹⁶¹ Given the ambiguity surrounding the injuries received, this must have been an important consideration.

Police officers do retain special protection from the criminal law as public servants who are employed to keep the peace. We can see this in the prosecutor's summing up of case 48, where the defendants were charged with assaulting a police officer:

Prosecutor: Firstly, there is the question of assaulting [the police officer], obviously he is in a vulnerable position, expected to go to houses and he doesn't know what he's going to find there. He is a person in a public office who is likely to be subject to assaults, and the Mode of Trial Guidelines suggest that cases of that sort may be unsuitable, even if the injuries received aren't that substantial.

The pregnancy of the victim in case 62, examined above, is also an important feature. In this case the prosecutor referred to this pregnancy and the age of the second complainant, who was 17 years old.

6.3.1.7 OAP: Provocation

Prosecutors frequently made reference to the absence of provocation as an aggravating feature, although usually within the context of a serious offence. For instance, in the section 20 sample, the prosecutor made such a reference in case 55.¹⁶² Likewise, the District Judge in case 42 questioned the prosecutor so as to confirm if the alleged offence was unprovoked, and this was referred to in the District Judge's reasons for his decision, although this was a case of head butting

¹⁶² In case 55, the defendant was alleged to have assaulted a college groundsman. This is one of those cases where there was a degree of ambiguity as to the extent of the injuries received by the complainant. It is likely that the unprovoked nature of the attack was only one of many aggravating features and in no sense decisive.

and was therefore regarded as very serious. Similarly, while the victim in case 28 was described as an ‘innocent bystander’, the nature of the assault – an attack with a glass – would in itself justify Crown Court trial. Finally, in cases 38 and 42, the prosecutor made reference to the unprovoked nature of the assault, but as these were allegations of biting, resulting in a puncture to the skin, and a group assault whereby the complainant suffered a broken nose, the lack of provocation can in no way be identified as the defining characteristic.

Alternatively, if there is no provocation, and the offence is otherwise lacking in aggravating features, the court will in all probability accept jurisdiction. So, in case 90, while the prosecutor made reference to the unprovoked nature of the incident, the allegation that it was a single blow resulted in the prosecutor recommending summary trial.

6.3.1.8 OAP: Racial abuse

In case 48 referred to above, the assault upon the police officer, one of the defendants was charged with racially aggravated threatening behaviour.¹⁶³ The element of racial abuse here – to quote from the prosecutor’s statement, the defendant allegedly said that the “officer in particular was a disgrace to his colour, he being an officer of mixed race” and other comments to the white police officers, describing them as “white trash” – was seen as an aggravating feature:

¹⁶³ Threatening behaviour is usually a summary only offence, but the aggravated offence is triable either way. This offence is a public order matter that is being analysed here as the case also involved an offence against the person. The Mode of Trial Guidelines for public order offences highlight clear racial motivation as a reason for declining jurisdiction.

Prosecutor: As far as the section 4A of the Public Order Act is concerned, your worships, the racially aggravating aspect, there aren't any specific guidelines, but of course the penalties are higher, they've been made deliberately higher for that sort of offence, and there are suggestions that cases of that sort may not be suitable for the magistrates' court...

6.3.2 Public order offences

Table 14 shows the statistics for public order cases:

Table 14: Public Order Act offences

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections		Magistrates' direction
All	17	8	47%	9	53%	1	6%	9	53%	16	94%	11%		89%
City	12	8	67%	4	33%	1	8%	9	75%	11	92%	25%		89%
County	5	-	-	5	100%	-	-	-	-	5	100%	-		-

While the public order offences in the City sample are similar to the overall sample, the preponderance of cases in the County sample (all 5), where the magistrates accepted jurisdiction, has skewed somewhat the total Public Order Act offence sample towards cases remaining in the magistrates' court.

As for specific case factors, like the offences against the person cases, there was a multiplicity of case factors highlighted by the prosecutor. Once again, the defendant's modus operandi was clearly regarded as an important case factor. Others that entered into consideration were the location or scene of crime, the position of the victim, legal considerations, the existence of a local legal culture,

any injuries received, the size of any group involved, and the existence of racial aggravation.

6.3.2.1 Public order: Modus operandi

Overall, the defendant's modus operandi was a useful predictor of venue. Case 56, an allegation of affray, is a case in point:

Prosecutor: At that stage he says he gets out of the car, he looks at him gesturing to come out, saying words to the effect of you and me, let's sort it out. Says he tries to ignore him. [He says] I will kill your fucking kids. He looks outside of his window and sees him outside of his house. He goes out, the complainant goes out at this stage. He says that the defendant says, "you got a gun aint you?" He says, "what are you on about?" He then says, "I've got one", puts one of his hands behind his back and begins to make a move towards the complainant – he opened the gate.¹⁶⁴

Although there is a reference to a gun in this case, in reality the defendant was merely aggressive and actually posed little danger to the complainant. Both the prosecutor and District Judge (who accepted jurisdiction) described the defendant's behaviour as little more than "words and gestures".

In contrast to this, we have case 12, where the defendant's modus operandi was so serious that only Crown Court trial would have been suitable. The brevity of the prosecutor's recommendations highlight the clear seriousness in this case:

¹⁶⁴ This is the extent of the allegations against the defendant; it is at this point that the complainant hits the defendant over the head with a pickaxe handle.

Prosecutor: As far as mode of trial is concerned Ma'am, the matter of affray involves the placing of a knife against someone's throat, and I would ask you to consider that being unsuitable for summary trial.

Contrast case 12 with case 88; here the defendant was charged with affray, and one of the allegations was of the defendant pushing his wife face down into the sofa, holding a wallpaper scraper over her throat saying, "who hasn't the guts to do it now? You'll squeal like a pig when I cut your throat". The bench accepted the prosecutor's recommendation that the case was suitable for summary trial.¹⁶⁵

Case 20 is also an interesting contrast to case 12, in that it also involved an incident where the defendant possessed a knife. However, in this case, the prosecutor initially made no firm recommendation as to venue; it was only when the District Judge pushed the prosecutor for a recommendation that she recommended the case be sent to the Crown Court. Such a weak recommendation, combined with the intervention of the defence solicitor, resulted in the District Judge accepting jurisdiction. The case concerned a suggestion that a knife was present, although not used, and the complainant felt threatened and intimidated. It is at this point that the District Judge asked for a firm recommendation. The prosecutor's reasons for eventually recommending Crown Court trial were the presence of the knife – and she took the unusual step of showing the District Judge a photograph of the knife, so as to emphasise its size – and the fact that the defendant had gained entry to the house. In the face of such an initially ambivalent recommendation, the defence solicitor chose to question the recommendation on two grounds. The first ground, on the Mode of

¹⁶⁵ Perhaps the key to this case is an understanding that this is an allegation of domestic violence.

Trial Guidelines, was a simple challenge. The defence solicitor pointed out that the facts in this case did not suggest that the case should go to the Crown Court under any application of the Mode of Trial Guidelines. In particular, the fact that the knife was not used, regardless of its size, suggested that the bench had the authority to accept jurisdiction.¹⁶⁶ The second ground of challenge in most cases would be seen as problematic. The bench have to make their decision as to venue on the assumption that the prosecution can prove what they allege. Yet, in this case, the defence solicitor did question whether the defendant gained entry without permission and suggested that the complainant invited the defendant into the house, thereby challenging one of the aggravating features in the case identified by the prosecutor. The challenge of the defence solicitor, combined with the ‘weak’ recommendation of the prosecutor, led the District Judge to accept jurisdiction.

In case 74, the defendant’s “swearing and shouting” was regarded as suitable for summary trial, while in case 72, mostly concerning shouting and gesturing with some attempts at engaging in a fight, the defendant’s actions were also regarded as suitable for summary trial. In case 72, there was a suggestion that one of the defendants was in possession of a curtain pole that could have been used as a weapon, but the prosecutor noted that this was not used.

¹⁶⁶ The Mode of Trial Guidelines specifically refer to the *use* of a weapon (emphasis added).

6.3.2.2 Public order: Location and scene

Case 20, examined above is another example of the defendant gaining entry to the complainant's home; once again, this was not a decisive factor, although in this case the defence solicitor did challenge this part of the allegation.

Interestingly, in case 7, the presence of a child may have been decisive; the defendant was alleged to have threatened an off-duty police officer. On the recommendation that the case was not suitable for summary trial, the District Judge questioned whether the Crown Court was an appropriate venue, as the allegations involved one attempted punch and jostling and pushing. It is at this point that the prosecutor made reference to the presence of a 17 month-old child. However, the defence solicitor also indicated that the defendant did not object to Crown Court trial; perhaps an indication that the defendant would be electing in any event. The District Judge therefore declined jurisdiction.

6.3.2.3 Public order: Position of victim

In both of the City cases of violent disorder, police officers were subjected to the defendant's behaviour, but only in case 6 was this probably decisive. In case 69, the throwing of bottles, in the context of football hooliganism, resulted in the case being directed to the Crown Court. In case 6, the defendant led a group of youths towards police officers while waving a wooden baton above his head. While the incident was merely a "stand off" between the police and youths, the

direct targeting of police officers¹⁶⁷ aggravates the offence. In one of the City affray cases (case 7 examined above), it is doubtful if the status of the defendant, as an off-duty police officer, was determinative of venue. The prosecutor made no reference to the allegation that the victim was targeted because of her status as a police officer. In her statement, she alleged that the defendant stated to one of his friends, “there’s that fucking pig bitch” before the confrontation.

6.3.2.4 Public order: Legal considerations

Case 7, examined above, contrasts with case 3, examined as part of the offences against the person sample; here the District Judge did decline jurisdiction after hearing an indication from the defence solicitor that the defendant would elect. While at first not convinced by the prosecutor’s recommendation that the case was not suitable for summary trial, the District Judge may well have considered the futility of accepting jurisdiction, given this indication by the defence solicitor.

In case 80, the prosecutor pointed out that the bench possessed a maximum sentence of 12 months’ imprisonment due to the existence of two either way offences. The effect of the possibility of consecutive sentences enables the bench to accept jurisdiction in more serious cases that would otherwise be directed to the Crown Court.

¹⁶⁷ As highlighted in the Mode of Trial Guidelines.

6.3.2.5 Public order: Local legal culture

For the most serious either way offences, it appears that there almost exists a local legal culture where these offences will nearly always be regarded as not suitable for summary trial and this process operates for charges of violent disorder.¹⁶⁸ Case 6, an allegation where the activities of the defendant would most probably be regarded as an affray, was regarded as not suitable for summary trial; in effect there was nothing more than a “stand off” between the police and a group of youths with the defendant waving a baton around his head. While there may have been a threat of violence, none was actually used by the defendant. The prosecutor noted, “violent disorder is usually seen as not suitable for summary trial”.

Case 69 involved different considerations of a local legal culture. The offence, being one of football hooliganism, was seen as a specific local problem that necessitated local action. As a result, local criminal justice professionals took a dim view of such violence and were more willing to push for deterrent sentences. While the conduct (throwing bottles at police officers) may have more explanatory power than this specific local effect, there is little doubt that this local problem was influential. The file review noted, when recording the recommendation as to venue, this involved, “the throwing of bottles associated to football hooliganism”.

¹⁶⁸ The Mode of Trial Guidelines state that cases of violent disorder should be committed for trial. This must raise questions as to the classification of this offence.

6.3.2.6 Public order: Injuries

Given that the rationale of public order offences is to provide a remedy for activities that threaten peace and security, the causing of injuries is in no way the primary consideration for these offences. However, occasionally the violence used by the defendant may cause harm to others.¹⁶⁹ For instance, in case 69 the “barrage of bottles” caused “facial injuries” to one of the police officers at the scene. While not specifically referred to in the mode of trial hearing as an aggravating feature, the use of such a weapon resulting in injuries must inevitably be an important consideration in the process.¹⁷⁰

6.3.2.7 Public order: Group offences

No prosecutor specifically referred to the group nature of the charges of violent disorder in cases 6 and 69. The criminal law adopts the approach that group offences are more serious than lone criminal enterprises, due to the group dynamics that are larger than the sum of the individual contributions. While the existence of a group no-doubt influenced the choice of charge in these two cases, there was no specific reference to this consideration in the mode of trial hearing.¹⁷¹

¹⁶⁹ Prosecutors may charge public order offences for violent conduct, either in addition to or as an alternative to an offence against the person. Where the defendant faces a charge of assault and a public order offence, these cases have been examined as part of the offences against the person sample as the case features identified by the prosecutor concerned the assault.

¹⁷⁰ The Mode of Trial Guidelines refer to the use of a weapon, or the causing of significant injury, as reasons for declining jurisdiction.

¹⁷¹ The Mode of Trial Guidelines refer to “organised violence” as an aggravating feature.

6.3.2.8 Public order: Racial aggravation

In the examination of offences against the person, we have already examined case 48, where the defendant was charged with the public order offence of racially aggravated threatening behaviour, and the recommendation from the prosecutor that the case was not suitable for summary trial partly on the basis of the racial aspect of the allegations.¹⁷² In case 80, the defendant was also charged with racially aggravated threatening behaviour and affray. While the offence mainly consisted of the defendant “shouting and screaming” after being found by the police in a “disturbed and upset condition”, comments made to a police officer – “fuck off you dirty smelly paki bastard” – undoubtedly aggravated the offence. Before the presentation of the case, the legal adviser was surprised to hear that the prosecutor would be recommending summary trial due to the existence of the racial aggravation. The prosecutor explained the recommendation on the likely available sentence; the charging of two either way offences opens the possibility of two consecutive six-month sentences. The bench accepted jurisdiction.

6.3.3 Dishonesty offences

Table 15 outlines the figures for dishonesty offences:

¹⁷² The Mode of Trial Guidelines are clear on this point; if the “offence has clear racial motivation” then it should be regarded as not suitable for summary trial.

Table 15: Dishonesty offences

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	30	17	57%	13	43%	3	10%	20	67%	29	97%	23%	85%
City	18	11	61%	7	39%	3	17%	14	78%	17	94%	43%	79%
County	12	6	50%	6	50%	-	-	6	50%	12	100%	-	100%

Once again, the profile for dishonesty offences is similar to that for the sample as a whole. If there is any difference, the rate of elections in the City dishonesty sample (17 percent) may be high compared to the 9 percent for all cases in the sample.

The offences against the person and dishonesty samples are the two largest in the whole sample, and the dishonesty sample therefore shares with the offences against the person cases the presence of a multiplicity of case factors. As is the case with all offences, the *modus operandi* is important but additional factors include the value of any property taken, if the defendant is in a position of trust, the existence of a local legal culture and legal factors.

6.3.3.1 Dishonesty: *Modus operandi*

In three cases in the City sample (cases 11, 23 and 24), the defendant was alleged to have taken property from a motor vehicle. In short, this offence was considered to be non-serious, similar to shop theft. For instance, in case 11, the prosecutor stated that this offence was in no way serious. In this case, the mode of trial hearing actually concerned two separate cases; three dwelling house burglaries along with an associated theft and the theft from a motor vehicle. The prosecutor made two separate recommendations in this one hearing for the two

courses of conduct and distinguished between them. As to the theft from a vehicle, the prosecutor noted that:

Prosecutor: so far as the theft from the motor vehicle is concerned, I can't pretend that that in itself is so serious that it should go to the Crown Court but certainly, in itself, it's a matter where the Crown would quite clearly have to say it's suitable for summary trial.

The existence of aggravating features did not make theft from a motor vehicle unsuitable for summary trial. So, in case 23, the prosecutor specifically referred to two aggravating features in the case; the time of the offence¹⁷³ and the fact that the defendants were engaged on an offending spree.¹⁷⁴ Nevertheless, partly on the basis that the vehicles were unattended, the bench accepted the recommendation that the case was not suitable for summary trial. Case 24 was clearly regarded as suitable for summary trial as a simple theft from a motor vehicle in the afternoon, with goods of low value taken. Within the County sample, offences of theft from a motor vehicle were also regarded as mundane. So, in case 81, a case where two defendants were charged with theft from a motor vehicle but were processed on different dates, the two mode of trial hearings were exceptionally similar. In the first hearing the prosecutor noted that:

Prosecutor: Yes, it's suitable [for summary trial]. It's an allegation of theft from a motor vehicle.

While in the second hearing, the prosecutor remarked:

¹⁷³ The defendants were arrested at 4:10.

¹⁷⁴ They were charged with stealing from three vehicles.

Prosecutor: It's an allegation of theft from a motor vehicle, suitable for summary trial.

There were frequent cases within the County sample where the facts, and the method of criminality, were regarded as 'speaking for themselves' in justifying the prosecutor's recommendation. Case 75 is a case in point:

Prosecutor: It's alleged the defendant stole some wheels and tyres and wheel, wheel nuts from a Ford Escort car, parked on a garage forecourt. Total value involved Sir, eight hundred pounds. The prosecution submit that summary trial is appropriate.

Similar treatment can be seen in case 99, an allegation of stealing and cashing a benefit cheque.

One offence of theft from a store was recorded in the City sample and somewhat surprisingly this was deemed unsuitable for summary trial. As explained above,¹⁷⁵ most cases of shop theft were regarded as the archetypal 'simple' case.

In case 41, the prosecutor began by making a similar observation:

Prosecution: In terms of the circumstances of the theft itself, that would be suitable [for summary trial] as a simple sneak theft. The two items were taken from [the store], were put in the back of a child's pushchair and he [the defendant] leaves the store.

However, upon being apprehended by two store detectives, the defendant resorted to violence to try to resist arrest. This violence, although rather severe – one witness said it took five men to restrain the defendant and the struggle lasted 13 minutes, while another reported 45 minutes – failed to cause serious injury.

¹⁷⁵ See section 6.2.1.

One store detective complained of cuts and reddening to the skin, while the other reported grazing, bruising, and soreness. If this case were to be determined purely upon the basis of the assault, then although the injuries are relatively trivial, the length of the assault, combined with the position of the victims – store detectives – would probably result in a determination that the case is not suitable for summary trial. However, the prosecutor chose to proceed with the summary offence of common assault, dropping the either way offence of assault with intent to resist arrest. The bench was therefore only at liberty to make a determination on venue upon the basis of the theft. However, the prosecutor asked the court to examine the conduct of the defendant “in the round” and take the associated violence against the store detectives into account when coming to a decision.

Prosecutor: The court as a matter of routine for the sentencing purposes regard any violence towards store detectives, whether or not it is charged, as being an aggravating feature, would the court take the surrounding circumstances into account when sentencing for the pure theft? You would give credit for the co-operative defendant who pleaded guilty to the matter and offered no threat of violence towards the store detective.

The defence solicitor took issue with this attempt to decide the issue by referring to conduct that was charged as a summary only offence.

Defence Solicitor: The Crown have doctored their position as regards any assault – they’ve dropped any indication of with intent to resist, ‘cause they’ve dropped the charge. My view, Sir, is that you should deal with it on the circumstances of the theft. We think it’s not good for the Crown to change the charges to a simple assault and then try to argue the reverse with that.

The District Judge accepted the prosecutor's recommendations and declined jurisdiction.

Three cases in the City sample are worthy of mention where the course of conduct was seen as deserving Crown Court trial. In case 50, the prosecutor made specific reference to a prolonged course of conduct. In case 66, the prosecutor made reference to the professionalism inherent in the defendant's actions,¹⁷⁶ and in case 60, reference was made to the number of victims subjected to the defendant's actions.

In case 50, the defendant was charged with one offence of theft and five offences of evading liability by deception. The main thrust of the allegations against the defendant concerned receiving goods from a tool hire and sale shop through the use of a credit account and dud cheques. In effect, the defendant received a number of tools, both purchased and hired, without making payment for these, and he offered numerous excuses as to why payment had not been received. The prosecutor, when making a borderline suitable for summary trial recommendation, made specific reference to the period of time over which the conduct took place.

Prosecutor: it is over a period of time, and it appears from the prosecution version of events to be a calculated course by the defendant. He must have known, at all stages, that the account cheques would not be honoured.

¹⁷⁶ The relevant section of the Mode of Trial Guidelines refer to conduct, "which has been committed or disguised in a sophisticated manner", or to "[t]heft or fraud committed by an organised gang".

The District Judge was also concerned about the period of time that encompassed the allegations, but for different reasons:

District Judge: What are you saying is the period? I only have dates spanning back two months.

The reply to this question, that he received from the prosecutor, of two and a half months, confirmed his suspicion that this was not too lengthy a period; he accepted jurisdiction.

In case 66, the professionalism of the defendant's conduct was seen as an aggravating feature. All three of the defendant's vehicles were found to be displaying false number plates and all vehicles were stolen. The prosecutor suggested a degree of professionalism, in that he bought the cars at a low value, bought new plates and then fixed these to the cars. However, the overall value (£21,500) was probably seen as decisive.

In case 60, the defendant was an operator for British Telecom and he used his position to obtain the account numbers and pin codes from charge card customers in order to make international calls. The numbers of victims were highlighted in the hearing, as this displayed the systematic, calculated and prolonged period of time involved in the allegations. The defendant was alleged to have made calls over a 10-month period, hence the high number of victims.

An allegation of organisation and coercion was important in case 76:

Prosecutor: The allegation is that he effectively coerced other employees to steal diesel fuel on his behalf. It's also an allegation that he has coerced people who are, were below him in the organisation – he's intimidated them to steal fuel on his behalf, not just the defendants who are in court [and pleaded guilty] but other people who have been cautioned for offences. And also Sir, that it's relatively organised in arranging for the CCTV to be turned off before he arrives at the depot. In those circumstances Sir, I say the matter isn't suitable for summary trial.

After being asked for the value of the diesel taken, the prosecutor remarked that the value is relatively low, but reinforced his recommendation:

Prosecutor: Sir, the value concerned is relatively low, but the breach of trust and particularly also the coercion of other employees who are dependent upon [the defendant] for effectively obtaining better employment within the depot itself – he's responsible for what shifts the other people worked and so he could influence greatly the amount of pay that they received. They describe themselves as feeling intimidated.

The District Judge declined jurisdiction.

The course of conduct in case 87, where the defendant was charged, inter alia, with seven offences of burglary, was clearly decisive:¹⁷⁷

Prosecutor: Well Sir, there are one, two, three, four, five to six dwelling house burglaries and associated handling and possession of drugs matters. Because of the dwelling houses, the prosecution submit that this is more suitable for trial at the Crown Court.

¹⁷⁷ The Mode of Trial Guidelines relating to burglary draw attention to allegations of a series of offences as being too serious for the magistrates' court.

The prosecutor simply counted the burglary charges, and this in itself was seen as enough to justify Crown Court trial. The reviewing lawyer commented upon the “course of conduct” engaged upon by the defendant.

For two other burglary offences in the County sample, the prosecutor made reference to the method of entry. So in case 77, the prosecutor noted how the defendant entered “through an insecure window”; such an unforced entry should be placed in juxtaposition with forced entry. While the bench accepted jurisdiction, the decisive case features were probably the fact that this was not a dwelling house burglary and the low value of property taken. In contrast, the prosecutor in case 94 made reference to a forced entry, although the high value of property taken was probably more instructive of the final decision made by the bench.

6.3.3.2 Dishonesty: Value

It was usual for the prosecutor to make a reference to the value of goods involved in the allegations; sometimes this was a passing reference and in others this was utilised as a reason for the recommendation.¹⁷⁸ Additionally, loose rules of thumb are used by the prosecution in relation to value. For instance, in case 11, the prosecutor referred to the value of property taken when explaining what became of the goods; “the cassette player is subsequently sold by the defendant

¹⁷⁸ The Mode of Trial Guidelines for all dishonesty offences refer to the value of un-recovered property as a consideration for the court.

for thirty pounds”, whereas in cases 15 and 24, the low value of the property was referred to as a reason for recommending the bench accept jurisdiction.

In some cases within the sample, the value of property was clearly substantial, resulting in some simple decision-making for the court. So, in case 66, the defendant was alleged to have stolen or handled cars to the value of £20,500, and in case 46, the defendant, when acting as a financial adviser, was alleged to have taken cheques from his clients of a value of £24,000. The defendant in case 32 was alleged to have obtained over £20,000 from his employer; he had been disqualified from driving yet continued to claim a mileage allowance when using the train. Also, in case 85, three defendants were alleged to have stolen a car valued at £18,500. In case 43, where the defendant was alleged to have stolen a car and received a stolen car with a combined value of £45,000, the prosecutor simply stated that she would be asking for Crown Court trial in view of the value of the goods concerned. Before she could add to this statement, the District Judge agreed and declined jurisdiction. After the hearing, the researcher questioned the legal adviser in court about this case and the brevity of the hearing; he suggested that where the value of goods exceeded £10,000, the case would be too serious for the magistrates’ court.

The value of goods concerned will not necessarily be decisive; benches will decline jurisdiction in cases where the value of any goods is small if there are other aggravating features. Benches will usually decline jurisdiction for domestic burglary cases, regardless of the value, and a severe breach of trust may also lead to the bench declining jurisdiction. So, in case 50 examined above, the

prosecutor recommended that the bench decline jurisdiction, not on the value of the tools taken (the prosecutor described the value as “over five thousand pounds”), but on the number of offences. However, given the availability of a 12-month sentence, the District Judge accepted jurisdiction.

If the goods are recovered, then even allegations of high value takings may be heard in the magistrates’ court.¹⁷⁹ So, in case 82, the defendant was alleged to have handled a car although this was recovered:

Prosecutor: Sir, in respect of that matter, you’ve heard an eight thousand pounds motor vehicle had been taken and was recovered by the police but it had been recovered. I suggest in the circumstances it’s suitable for summary trial.

The legal adviser reiterated that although this was a case of “high value”, the recovery of the property was something that should be taken into account as “that hasn’t been lost as the property has been returned”.

6.3.3.3 Dishonesty: Position of trust

If an offence is committed in breach of a position of trust then this is regarded as an aggravating feature, as the offender has been placed in a situation where extra responsibilities have been agreed and with these, correlating duties. Indeed, the Mode of Trial Guidelines specifically refer to breaching a position of trust as being an aggravating feature. The extent of a breach is an important

¹⁷⁹ This is reflected in the Mode of Trial Guidelines.

consideration when assessing mode of trial.¹⁸⁰ For instance, in case 22, the prosecutor noted that the defendant was an employee who was in a position of trust, but not to the extent that the case should be directed to the Crown Court. The defendant was an employee in a fast food establishment and was alleged to have taken money from a cash-box. The District Judge was happy to accept jurisdiction once he was sure that the cash-box was accessible to other employees. Similarly, the prosecutor in case 68 referred to a breach of trust as the defendant was an employee, but because of her “lowly position” this was not regarded as serious.

In contrast, the breach of trust in case 46, where the defendant was acting as a financial adviser and was handling large sums of the complainant’s property, was regarded as serious. However, the large sums involved (£24,000) were probably enough to justify the prosecutor’s recommendation. Similarly, in case 32, while the defendant breached trust by continuing to claim his mileage allowance, the sum involved (over £20,000) was probably decisive.

In case 60, the breach of trust was all important; the defendant was alleged to have taken over £3,000 by deception, using the charge card account details of British Telecom customers when he was acting as an operator. In summing up, the prosecutor noted that:

Prosecutor: It’s a breach of trust, large number of victims, over three thousand pounds, we say that’s not suitable.

¹⁸⁰ The relevant part of the Guidelines read, “[b]reach of trust by a person in substantial authority, or in whom a high degree of trust is placed.”

Finally, in case 76, the allegation of theft of fuel from the council depot, the prosecutor made specific reference to the breach of trust involved as the defendant was in charge of the depot.

6.3.3.4 Dishonesty: Local legal culture

We have already seen how shop theft and theft from a motor vehicle are clearly regarded as suitable for summary trial. In this regard, these cases are within a clear local legal culture that all the courtroom regulars share. A similar phenomenon exists in relation to dwelling house burglaries. The prosecutor's statement in case 14 goes straight to the heart of the matter:

Prosecutor: Sir, I have to say that this matter is not suitable for summary trial, and your sentencing powers are not sufficient due to the fact that it is a dwelling house burglary, of a flat, during the day, whilst the occupier was out.

A similar approach can be seen in case 5; here the District Judge asks a simple question of the prosecutor, before any representations have been made:

District Judge: Burglary of a dwelling house is the one that would take it up [to the Crown Court] I'd have thought?

The District Judge did not need to hear any representations and simply declined jurisdiction.

These two City cases show how prosecutors and District Judges view domestic burglaries. A third City case (14) shows how defence solicitors share this view. Here, the prosecutor made reference to the use of force to gain entry and the defence solicitor challenged this observation:

Defence Solicitor: Sir, I would take issue with only one thing that my friend had to say there, and that's the matter of force being used; that doesn't seem to be in the statement within the papers that I've been given today...

The use of force to gain entry would no doubt be an aggravating feature, yet the defence solicitor continued by accepting the prosecutor's recommendation:

Defence Solicitor: But, nonetheless, I don't dissent from my friends' view about the appropriate venue.

In a similar vein, within the County sample, case 87, an allegation of dwelling house burglary, was directed to the Crown Court, whereas case 77, an allegation of burglary of a bowls club where six pounds were taken, remained within the magistrates' court.

At this point it is worthwhile considering the Mode of Trial Guidelines. They assert that jurisdiction should be retained in either way cases unless any likely sentence will exceed six months *and* that an offence specific factor is present in the case. The case factors pertaining to dwelling house burglaries are that: entry is effected in the daytime when the occupier is present; entry at night to a house that is usually occupied, whether or not it is at that time; the offence is alleged to

be one of a series; soiling, ransacking, damage or vandalism occurs; the offence has professional hallmarks; or the unrecovered property is of high value. These features were not present in all of the domestic burglary cases within the sample yet the bench declined jurisdiction in every case, suggesting the existence of a local legal culture. Additionally, in case 87, the defendant was alleged to have entered at night when the occupants were at home, yet no reference of this fact was made by the prosecutor. In all probability, the number of allegations against the defendant suggested a prolonged course of conduct that made the decision a simple one.

6.3.3.5 Dishonesty: Legal factors

In a number of cases within the sample, the defendant faced multiple allegations of either way offences, meaning that the magistrates' court could impose a 12-month sentence. So, in case 50, the District Judge thought that although the case was serious, the extended available sentence resulted in him retaining jurisdiction:

District Judge: I believe that if you are convicted this is likely to attract a custodial sentence, but it seems to me within the court's power potentially to order consecutive sentences, and it would be within the power of this court to deal with it, and therefore I could accept that the trial might take place here in the magistrates' court.

The linkage of separate cases can sometimes result in cases being sent to the Crown Court. For instance, in cases 10 and 11, the defendant was charged with a number of separate offences analysed as two separate cases. Case 10 concerned

allegations of domestic burglary, while in case 11, the defendant was charged with theft from a motor vehicle. These are both cases where the prevailing legal culture points to a clear decision for the court. However, in case 11, the bench actually declined jurisdiction. This is partly explained by the link between the cases:

Prosecutor: I can't pretend that that in itself is so serious that it should go to the Crown Court, and the only way it might be pertinent because other matters are going to the Crown Court, but certainly, in itself, it's a matter where the Crown would quite clearly have to say it's suitable for summary trial.

However, in addition to such an ambiguous recommendation, the defence solicitor also indicated that the defendant would elect Crown Court trial. Whatever the reason – the linking of cases or the indication of the intention to elect – the bench declined jurisdiction.

Case 10 is also partly explained on the basis of a link between that case and another allegation not part of the sample. Within the mode of trial hearing, the prosecutor refers to a co-defendant who appeared before the court on a previous occasion where the bench declined jurisdiction. The prosecutor is suggesting that the decision has already been made for the bench when the co-defendant's case was sent to the Crown Court. The defence solicitor builds upon this:

Defence Solicitor: The co-defendant has been before your colleagues, and they decided that that should go to the Crown Court on dwelling house burglary. So be it. I think what my friend is alluding to, is that the young man is going to the Crown Court.

In case 93, the prosecutor and defence solicitor agreed that the existence of other matters at the Crown Court should result in these allegations of handling stolen cigarettes being directed to the Crown Court:

Prosecutor: You're already aware that they already have matters at the Crown Court. I think the defence, I think my friend, accepts that this matter will be going to the Crown Court in due course, if you agree Sir.

The defence solicitor clearly agreed:

Defence Solicitor: in view of the other matters that they have, it would be quite sensible to send them [to the Crown Court].

The defence solicitor also suggested that the bench's hands were tied in case 92. In this case, there were two mode of trial hearings, as after an initial mode of trial hearing, the prosecution amended the charges. As a result, the court reconsidered mode of trial. The defence solicitor clearly thought that this was a simple decision for the bench:

Defence Solicitor: Well Sir, the other charge that was originally laid was to be considered suitable, and these [new charges] just clarify [matters]. So Sir, there's no real difference and they're within your powers.

In contrast to case 11 examined above, the defence solicitor's indication of election in case 23 did not lead to the bench declining jurisdiction, one of the probable reasons being that the legal adviser reminded the bench that their

decision had to be made irrespective of this indication of the defendant's intentions. Similarly, in case 97, the defence solicitor stated that the defendant would elect. The legal adviser once again reminded the bench that they were to make their decision regardless of this indication. However, the bench responded to the prosecutor's borderline recommendation by declining jurisdiction.

6.3.4 Drug offences

Table 16 shows the figures for drug offences:

Table 16: Drug offences

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections		Magistrates' direction
All	10	9	90%	1	10%	-	-	9	90%	10	100%	-	-	100%
City	8	7	88%	1	13%	-	-	7	88%	8	100%	-	-	100%
County	2	2	100%	-	-	-	-	2	100%	2	100%	-	-	100%

Drug offences do not share the same profile as other offences, as by far the majority of such cases are directed to the Crown Court. There was a clear preponderance of possession with intent to supply cases that, as shown below, were regarded as serious. It is speculated that straight possession offences either result in a caution, or when coupled with other allegations, usually result in a guilty plea. As a result, only those serious cases of possession with intent to supply undergo a mode of trial hearing.¹⁸¹

The case features that were identified in the sample can be grouped into different categories: the amount of drugs possessed or cultivated; the allegation of an

¹⁸¹ An examination of the police interview records reveals that frequently the defendant admits possession, but denies any intention to supply.

intention to supply; the defendant's modus operandi; the scene of crime; and the existence of a local court culture. Two of these categories are unique to drugs offences; the amount of drugs and any intention to supply. These both go to the heart of the prohibition on drugs. Drug offences, unlike say offences against the person, do not involve any specific actions of the defendant that cause direct harm to another, but are instead concerned with possession of substances that are regarded as involving the risk of long term harm. The amount of any controlled substance therefore impinges upon seriousness and greater quantities lead to a greater risk of harm. Similarly, the existence of any intention to supply is the defining characteristic of this aggravated offence, as it involves a direct amplification of the problem.

6.3.4.1 Drugs offences: Amount

In all of the cases in the City sample, the prosecution had something to say about the amount of drugs seized. In some cases, this was the defining characteristic, while in others different case features were important.¹⁸² For instance, in case 29, the defendant was apprehended in possession of 360g of cannabis and was charged with possession with intent to supply. While reviewing the case, the prosecutor stated that such a case would inevitably be sent to the Crown Court, as anything more than an ounce was not suitable for summary trial. Similarly,

¹⁸² For drugs offences, the Mode of Trial Guidelines suggest that the amount of drugs seized should only have influence in restricted circumstances. The Guidelines suggest that, for possession with intent to supply class A drugs, all cases should be committed to the Crown Court. For possession with intent to supply class B drugs, these should "be committed for trial unless there is only small scale supply for no payment." Simple possession of class A drugs should be "committed for trial unless the amount is consistent only with personal use." Simple possession of class B drugs should "be committed for trial when the quantity is substantial and not consistent only with personal use".

possessing 39 ecstasy tablets (case 31), possessing 172g of cannabis (worth £861.05 – case 79) and the cultivation of 30 cannabis plants (case 37), were regarded as too serious for the magistrates' court. In contrast, the possession of 0.53g of heroin was regarded as suitable for summary trial. While the District Judge was unsure as to whether the case should go to the Crown Court because of the weapon possessed by the defendant, nothing was said about the heroin.

6.3.4.2 Drugs offences: Intention to supply

In case 16, the allegation of possession with intention to supply resulted in the possession of a small amount of drugs being sent to the Crown Court:

Prosecutor: you have people within a vehicle, and they were concerned in what the Crown would say is the supply of drugs – 80 grams of heroin and supply of crack cocaine and clearly it's going to be supplying to clients and people who want it, cruising around and selling it.

The defence solicitor challenged this recommendation:

Defence Solicitor: whether or not you feel the powers of this court are suitable [for summary trial], bearing in mind the amount of drugs that you've been told about. I'd rather give you a street value, but it's not a massive amount of drugs in terms of dealing values, but obviously, it's a matter of preference for you. Possibly borderline.

The defence solicitor acknowledged the amount as more than simple personal use, but questioned whether Crown Court trial was justified.¹⁸³ However, the prosecutor expanded upon this suggestion of a low street value:

Prosecutor: The reason why I don't have a street value – one thing about the value is this, that as the supply of drugs increases, and drugs have become cheaper, and they do become cheaper, and they are much cheaper, the fact is, by giving a street value I reduce the scale of the problem. The greater the supply, the lower the value, and the lower the perceived problem, so amount is more important than street value.

On one level this statement was a defence of the practice of giving amounts rather than street values, but it also performed a more evaluative function. The prosecutor was implying that the local problems of drug use had reached the stage where the market was saturated, resulting in a fall in prices. As a result, the implication was that the courts needed to deal with this specific local problem.

The importance of intending to supply is also displayed in case 30; the defendant was charged with possessing 1.8 and 0.53 grams of heroin (contained in 11 and 5 cling film wraps respectively) with intent to supply. The prosecutor acknowledged that this was not an excessive amount, but went on to state that case law¹⁸⁴ suggested the supply of class A drugs (no matter how small the amount), even if an example of 'social supply', should be directed to the Crown Court.¹⁸⁵

¹⁸³ In the face of the Mode of Trial Guidelines.

¹⁸⁴ The prosecutor only made a generic reference to case law and failed to refer to any particular case.

¹⁸⁵ This approach accords with the Mode of Trial Guidelines.

6.3.4.3 Drugs offences: Modus operandi

Any allegation that the defendant was engaged in a professional or commercial venture will aggravate the offence. For instance, in case 65, the allegation of a commercial enterprise was probably decisive. The defendant was charged with possession of 5.68 and 5.6 grams of cannabis with intent to supply. The prosecutor stated that, although the amount of drugs seized was small, the case may be just outside the powers of the magistrates' court. Great importance was placed upon a piece of paper found in the defendant's possession; a list of names and numbers. This list was said to suggest commercial activities, along with the associated "paraphernalia" also found to be in the defendant's possession. Similar conclusions were drawn in case 29, where the defendant was alleged to have £11,000 passing through his bank account, that could not be legitimately explained. In case 37, the prosecutor noted how the defendant was involved in a "very nice set up" that involved "lights and leads and that sort of thing".

6.3.4.4 Drugs offences: The scene of crime

In two cases, the prosecutor made an indirect reference to the scene of crime. So, in case 16 the prosecutor suggested that the defendants were "cruising" around and selling to people who wanted to buy. The prosecutor was implying that the defendants were being proactive and looking for 'customers' rather than waiting for their usual 'clients' to contact them, therefore suggesting an aggressive 'marketing strategy'. Rather different was the reference in case 31 to the offence taking place in a "nightclub situation". This linked to a perception that drug use

was prevalent in nightclubs and that criminal justice agencies should respond appropriately.¹⁸⁶

6.3.4.5 Drugs offences: Local court culture

In case 54, the prosecutor was clear on the existence of a local court culture that generated expectations as to how to dispose of drug offences:

Prosecutor: Ma'am, the normal policy, as far as possession with intent to supply is concerned, is committal to the Crown Court, and is what we advise in this case.

Certainly, all of the cases in this sample concerned with possession with intent to supply were sent to the Crown Court, supporting the existence of a local legal culture. However, the comments from the prosecutor in case 65, that the case was not suitable for summary trial because of the commercial nature of the defendant's activities, suggested that this was not a rigid policy, more a guide to action.

6.3.5 Sexual offences

Table 17 outlines the cases of sexual assault:

¹⁸⁶ For more on the perceived problem of drug use in nightclubs see Collin (1998).

Table 17: Sex offences

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	5	2	40%	3	60%	1	20%	3	60%	5	100%	33%	67%
City	1	-	-	1	100%	-	-	-	-	1	100%	-	-
County	4	2	50%	2	50%	1	25%	3	75%	4	100%	50%	67%

Somewhat surprisingly, the norm for sexual offences seems to be that the magistrates retain jurisdiction. Early impressions in the field suggested that sex offences were one of the few offences (along with those against children) that could have an effect on prosecutors. Upon entering the field, it was surprising how prosecutors could routinely discuss serious crime in an everyday, mundane manner. This did not apply, however, to sexual offences, which were still discussed with a degree of shock and sadness, not usually associated with the work of a prosecutor. It was therefore expected that sexual offences would predominantly be sent to the Crown Court. The most serious sexual offences against children were transferred to the Crown Court to make use of video links for the giving of evidence (thereby bypassing the mode of trial procedure). However, others resulted in a guilty plea, even though the concern shown by the professionals inevitably inflated their appearance during the course of the fieldwork process. So, while concern about sexual offences played a large part in the fieldwork experience, this was not translated to cases in the sample.

Within the mode of trial hearing, prosecutors again made reference to different case features: the defendant's modus operandi; the age of the complainants; the available courtroom procedures; the injuries received; and legal factors.

6.3.5.1 Sexual offences: Modus operandi

For some offences, prosecutors almost expected the facts to speak for themselves; the implication being that the case was so obviously clear that the prosecutor did not need to expand upon her recommendation.¹⁸⁷ For instance, in case 98, the prosecutor simply described the alleged indecent assault – the defendant stopped the complainant in the street and asked her if she would like to appear in a “home movie” while kissing her hand and cheek; this was deemed sufficient to justify the recommendation that the bench retain jurisdiction. By contrast, the allegations in case 95 were so serious that again little needed to be said. The defendant was alleged to have “caressed and sucked” the breasts of his daughter’s friend and “then rubbed her vagina” on more than one occasion. The prosecutor also indicated that similar acts were alleged to have been committed against the defendant’s daughter.

6.3.5.2 Sexual offences: Age of victim

The ages of the victims were aggravating features in cases 78, 95 and 96. In case 78, the ages of the complainants (9 and 12) did concern the court, but by far the greatest problem was the availability of courtroom procedures. While the victims in case 95 were 13 and 15, the seriousness of the allegations were clearly the defining characteristic in the case. In case 96, the prosecutor referred to the

¹⁸⁷ The Mode of Trial Guidelines refer to the “[s]erious nature of the assault” as an aggravating feature.

disparity in age between the victim and the defendant as being a reason for the recommendation that the offence was not suitable for summary trial:¹⁸⁸

Prosecutor: Madam, given the disparity in ages – the youth being some thirteen years of age and [the defendant’s] age¹⁸⁹ – I would submit that it’s not suitable to be dealt with in this court and insufficient powers of sentence.

6.3.5.3 Sexual offences: Courtroom procedures

In case 78, there was an allegation that the victims “felt their bottoms squeezed” by the defendant; the prosecutor thought that the case was within the sentencing powers of the court, and that summary trial would be more appropriate given the age and welfare of the complainants:

Prosecutor: Of course, you have to take into account the welfare of the two victims, and the prosecution suggest that having the trial sooner rather than later, in the less formal proceedings perhaps of the magistrates’ court, would be of benefit to them.

The defence solicitor was happy with this recommendation, but the legal adviser did foresee a problem; the need for evidence to be given by video-link and the non-availability of such procedures in the magistrates’ court. The prosecutor then acknowledged this as a potential problem, but described the issue as a balancing act:

¹⁸⁸ The Guidelines refer to vulnerable victims, of a “[s]ubstantial disparity in age between victim and defendant and a more serious assault”.

¹⁸⁹ The defendant was 49.

Prosecutor: Sir, obviously the two victims couldn't give evidence by video-link in the magistrates' court, but part of the consideration is obviously how long they have to wait before they have to give evidence at the Crown Court. Obviously, video-link, they give their evidence by way of video, and are then cross-examined in the Crown Court, so one way or the other they face questioning. It's a balancing act and that's the difficulty of it.

The legal adviser agreed that the issue was one of balance between the available facilities in the Crown Court and the delay that would be generated by sending the case to the Crown Court. He also pointed out that screens would be available in the magistrates' court to lessen the impact of having to face the defendant in court. After retiring, the bench accepted jurisdiction.

6.3.5.4 Sexual offences: Injuries

The defendant in case 53 was charged with indecent assault and the allegation concerned an incident outside a fast food establishment. The defendant was alleged to have approached the complainant, said, "I know your wife" and then grabbed his testicles. In making his recommendation, the prosecutor drew attention to the lack of injuries caused:

Prosecutor: I don't think he refers to any injuries apart from the obvious discomfort from the initial assault. In the circumstances, Sir, I think it is a matter properly for this court to deal with.

6.3.5.5 Sexual offences: Legal factors

In case 78, as well as referring to the need to dispose of the cases as soon as possible for the benefit of the victims, the prosecutor also noted how the existence of two either way allegations increased the court’s sentencing powers to 12 months’ imprisonment.

6.3.6 Driving offences

Table 18 displays the figures for driving offences:

Table 18: Driving offences

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections		Magistrates' direction
All	4	2	50%	2	50%	-	-	2	50%	4	100%	-	-	100%
City	2	2	100%	-	-	-	-	2	100%	2	100%	-	-	100%
County	2	-	-	2	100%	-	-	-	-	2	100%	-	-	-

In all four driving cases, the prosecutor’s observations focused upon the modus operandi of the defendant. Dealing with the two City cases first, the defendants in case 4 faced allegations of aggravated vehicle taking and allowing to be carried in the taken vehicle. A number of aspects of the driving were highlighted as aggravating features: on the motorway the car was driven at speeds in excess of 100 miles per hour;¹⁹⁰ the driving was for a lengthy period of time;¹⁹¹ and there were two near misses where the driver nearly collided with other road users. Finally, the defence solicitor, in accepting this recommendation, referred to an allegation that the car attempted to ram a police vehicle off the road. In the

¹⁹⁰ The Guidelines draw attention to “[g]rossly excessive speed” as an aggravating feature.
¹⁹¹ The Guidelines also require a consideration of whether the course of driving could be described as prolonged.

other City case (34), an allegation of dangerous driving, the two main features also concerned near misses. So, when driving down the motorway, the defendant used the hard shoulder and came “very close to a broken down vehicle” while the driver of that vehicle was standing nearby. Later, when driving on A roads, the defendant crossed a red traffic light “on the wrong side of the road causing traffic in the other direction to swerve in order to avoid a collision”. At this point, the District Judge stopped the prosecutor and declined jurisdiction.¹⁹²

As for the County cases, these were both allegations of dangerous driving where the bench accepted jurisdiction. In case 73, the prosecutor stated that there was an aggravating feature, but this simply made the case one of dangerous driving rather than driving without due care and attention. The defendant was alleged to have made the wheels spin on his car so that “plumes of smoke were observed coming from the front tyres of the vehicle that was being driven under harsh acceleration”. The aggravating feature was the presence of a crowd watching the driving. However, as there was no allegation of driving with excess alcohol or driving whilst disqualified, the case was regarded by the prosecutor as suitable for summary trial and the bench accepted this recommendation. In case 100, an unmarked police car encountered the defendant driving a vehicle at “an excessive speed”, with the driver “driving erratically and braking suddenly”. Once the police attempted to stop the vehicle, the defendant executed a U-turn and drove at the unmarked police vehicle in an attempt to ram it off the road. When the police vehicle successfully evaded this attempt, the defendant then reversed his car, again towards the police vehicle. The prosecutor noted that “more by good

¹⁹² The Guidelines refer to incidences of significant injury or damage, rather than the potential for such injury or damage.

luck” no collision took place, yet was able to recommend the bench accept jurisdiction. While the two cases in the City sample involved more prolonged courses of conduct, they seemed to be decided differently on the basis of similar near misses.

6.3.7 Inchoate offences

There was only one inchoate offence in the sample. The bench directed this case to the Crown Court after a recommendation to this effect by the prosecutor. In case 13, the defendant was charged with inciting another to inflict actual bodily harm. Here, the defendant was in prison and while there, he wrote a letter to his sister. Part of that letter contained an instruction to his sister to contact a third party to arrange for the assault of two complainants, who had made another allegation against the defendant. The prosecutor did not focus upon the substance of the allegations, but instead asked the court to view this as analogous to interference with witnesses as the reason for his recommendation that the case was not suitable for summary trial. While the defence solicitor attempted to minimise the impact of the letter – he noted how the defendant merely suggested that the complainants be “cuffed” and that he didn’t expect them to operate upon this suggestion – the defence solicitor did accept that this case would be directed to the Crown Court.

6.3.8 Possession of weapons and preparatory offences

Table 19 shows the figures for possession of weapons and preparatory offences:

Table 19: Possession and preparatory offences

	Total	Directed to Crown Court		Magistrates retain jurisdiction		Defendant elects		Cases sent to Crown Court		Agreement		Defendant elections	Magistrates' direction
All	8	5	63%	3	38%	-	-	5	63%	7	88%	-	100%
City	6	3	50%	3	50%	-	-	3	50%	5	83%	-	100%
County	2	2	100%	-	-	-	-	2	100%	2	100%	-	100%

Given the small number of cases in the County sample, it is worth examining the total number of possession and preparatory offences; these display a similar profile to the sample as a whole, with a bare majority of cases being directed to the Crown Court because the bench declined jurisdiction. Of the three cases where the defendant was given an option, none elected Crown Court trial.

Analysis of these cases suggests a number of considerations: the type of weapon possessed; whether it was used; and the time and place of possession.

6.3.8.1 Possession: Type of weapon

In only one case did the type of weapon actually have any influence the decision of the court. In case 26, the defendant was alleged to be in possession of a CS gas canister. The prosecutor thought that magistrates' court trial would be sufficient, as the canister was not used, and the defence solicitor concurred with this view. However, the District Judge was not convinced and suggested this was an unusual weapon that demanded a more severe response. However, as the defendant was also charged with another either way offence, resulting in a possible 12-month sentence, and that the weapon was not used, the District Judge finally accepted jurisdiction. Otherwise, a variety of different weapons such as a

rounders bat, a kitchen knife with a nine inch blade, a 20 inch wooden stick with two sharpened ends and a lock knife drew no specific comment.

6.3.8.2 Possession: Use of weapon

It has been seen above how the non-use of the CS canister in case 26 was regarded as justifying summary trial by the prosecutor and reluctantly accepted by the District Judge. Similarly, in cases 27 and 52, the prosecutor made similar representations. In case 27, the prosecutor noted that:

Prosecutor: There's no suggestion, Sir, of any use or threatening at the scene, and therefore a matter suitable for summary trial in my submission.

In case 52 the prosecutor said:

Prosecutor: Sir, the prosecution say that there are no aggravating features attached to this. There was no suggestion that it was used.

Case 19, however, was far more complex and the prosecutor, if not directly, gave the impression that the weapon had been used in an assault. The prosecutor could not directly state that the weapon had been used, as the victim to the implied assault did not wish to complain, and the available CCTV evidence was not clear on this point. Under such circumstances, the prosecution would have been unable to prove any assault allegation, hence the necessity of proceeding with the offensive weapon charge. The prosecutor's conclusions summed up the case:

Prosecutor: It's a very difficult case, your worships, it's the town centre, it's at night, and it's with a baseball bat, but on the other hand the man lying on the floor didn't apparently wish to complain.

In other parts of the hearing, the prosecutor describes how the defendant was seen standing over the victim holding a bat and the CCTV evidence showed the victim lying "on the floor apparently trying to defend himself". The bench, confronted with such an ambiguous set of observations (the prosecutor made a borderline suitable for summary trial recommendation), accepted jurisdiction. Given the context of the implied assault (a night time city centre attack with a weapon that resulted in facial injuries), had it been possible to prove these allegations, there is little doubt the prosecutor would have firmly recommended that the bench decline jurisdiction.

6.3.8.3 Possession: Time and place

The prosecutor's statement in case 19 above makes it clear that any allegation of night time city centre violence will be regarded as an aggravating feature.

6.3.9 Criminal damage

There was only one offence of criminal damage in the sample. The bench declined jurisdiction after a recommendation that the case was not suitable for summary trial by the prosecution.

In this case (84) the defendant was charged with possession of petrol bombs “with intent to use them at various premises” and an allegation of causing criminal damage by fire, with a value placed upon the damage of £6,000.¹⁹³ The prosecutor noted, in addition to these bare details, that:

Prosecutor: It seems to be a spree of offending and damage. I suggest the matters aren't suitable for summary trial.

In reaching their decision, the bench commented upon the value of the damage caused:

Chair: Yes, well we would agree with that because of the high damage caused, and everything else that goes along with it, we believe that it's better to be dealt with at the Crown Court.

6.3.10 Offences against justice

There were two cases of offences against justice in the sample. The bench retained jurisdiction in both cases following the recommendation of the prosecution. Both defendants consented to summary trial.

In case 63, the defendant was charged with interference with a witness after threatening his partner, who had made a complaint to the police against the defendant. The prosecutor chose to focus upon the trivial nature of the

¹⁹³ The Guidelines draw attention to deliberate fire raising and causing damage of a high value as aggravating features.

defendant's conduct.¹⁹⁴ The defendant was alleged to have shouted, "If I go to court, I'm going to kill you, I'll have you". Additionally, two small children were present at the scene. Nevertheless, the prosecutor, due to the absence of any direct violence, recommended that the bench accept jurisdiction and the bench agreed. Similarly, in case 1, the bench accepted jurisdiction when the defendant made threats to kill a witness (his ex-partner) and then left (again when children were present).¹⁹⁵

6.4 Conclusions

A number of different conclusions arise from the disparate threads of this analysis. Firstly, there is a clear multiplicity of case factors raised by the prosecution and these are not necessarily highlighted in the Mode of Trial Guidelines. Indeed, in some circumstances, actual court practice does not fit with the Guidelines. For instance, the bench declined jurisdiction as a matter of course for allegations of domestic burglary, even in situations where no case factors were present that are highlighted in the Guidelines as reasons for declining jurisdiction. This leads to the second conclusion: a local legal culture helped determine venue for a whole host of cases. Domestic burglary, section 20 assaults, violent disorder, possession of class A drugs with intent to supply, and property offences where the value of the property taken exceeds £10,000, are all deemed to be unsuitable for summary trial regardless of any other case features. Similarly, there are offences – shop theft and theft from a vehicle are two

¹⁹⁴ This can be compared to case 13, where the prosecutor likened the activities in inciting others to commit violence as akin to witness intimidation, therefore supporting the recommendation that the case was not suitable for summary trial.

¹⁹⁵ Both of these could be classified as domestic violence cases, thereby raising the discrete issues that will be examined in Chapter 7.

examples – where the bench will nearly always retain jurisdiction. Thirdly, some of these case factors appear to be more important and more influential than others, even to the extent that some case factors seem to be decisive in the recommendations of prosecutors, while others simply appear to be paid lip service by prosecutors. For offences against the person, the manner of the assault and the extent of any injuries inflicted were highlighted as highly influential, while factors such as the location of the incident, the absence of provocation or the presence of children, while described as important by prosecutors, very rarely proved decisive. Finally, the multiplicity of factors suggests that an analysis of these cannot give an indication of venue in all cases. The existence of many factors that can sometimes result in contradictory indications gives credence to the professional's belief that deciding upon mode of trial is something that is a practiced art which cannot simply be reduced to words. The induction of the designated case worker evidenced how the professionals utilise an inherent common sense and understanding of the local culture that frames behaviour. While an understanding of the factors used does get us closer to comprehending this decision, such an understanding cannot be complete without analysis of the sociological aspects of practice.

CHAPTER SEVEN

“HE’S SHOUTING ABOUT THE CHILD”:

DECIDING VENUE IN THE COURT,

SOCIOLOGICAL ASPECTS

7.1 Introduction

Chapter 4 explained the theoretical approach of the thesis and described (courtroom) interactions as multifaceted with different layers of depth. Within Chapter 5, it was explained how narrative analysis could offer an entry point into the data in order to explore these levels of action. Now legal aspects of the data have been examined, sociological influences upon the data will be examined through an analysis of narrative (re)production practices.

7.2 Narratives and legal storytelling

Within Chapter 5, a fictional mode of trial hearing was created to explain how prosecutors generally constructed narratives within the courtroom. Typical narratives consist of different sections that address specific questions before an audience asks them. Narratives can contain an abstract, orientation, complication, result and evaluation, and all of these sections were found within the narratives delivered by prosecutors. However, each narrative section took a particular form within the mode of trial hearing, and this form gave some important insights into the work of prosecutors and criminal justice agencies.

7.2.1 The abstract

The abstract is most notable by its absence in the data. As the abstract functions to create space for the delivery of a narrative, it is not strictly necessary in the mode of trial hearing. Conversational analysis suggests that everyday conversation is marked by the use of adjacency pairs, such as question-answer, and complicated turn-taking rules. The abstract is the means by which the narrator informs (or requests of) those listening that normal turn taking conventions are suspended and an extended turn will follow where the narrator tells the story.¹⁹⁶ In everyday conversation we might say “let me tell you a story”. However, in the mode of trial hearing, such requests are unnecessary as institutional conventions determine who speaks when. Courtroom participants know the sequence of utterances within the courtroom and come to expect that certain speech acts will take place in certain places at certain times. The prosecutor therefore does not need to begin with an abstract, as all regulars know what will happen next.¹⁹⁷ The magistrate will deliver a standard statement asking the defendant for her plea and explaining the consequences of that plea. If there is a plea of not guilty, the prosecutor will then deliver their mode of trial observations, followed by the defence solicitor’s statement. Nevertheless, even though an abstract is unnecessary for the court regulars, prosecutors did occasionally introduce their observations with an abstract. For instance, the

¹⁹⁶ See for Cortazzi (1993) for one attempt at incorporating some of the tenets of conversational analysis into narrative analysis

¹⁹⁷ The absence of an abstract could be said to indicate who owns the court. While courtroom regulars may know what to expect next, the same cannot be said of others, such as defendants and members of the public who are observing. By not using an abstract, prosecutors could be said to be neglecting these courtroom outsiders.

prosecutor in case 25 opened with a typical abstract; “as far as mode of trial is concerned, the prosecution say that this is a matter which you can try here”. Similarly, the prosecutor in case 40 started by saying that, “the prosecution say that this matter is not suitable for summary trial”. These are just two examples of standard abstract clauses that can be found, albeit infrequently, within the data set. Although mundane, they evidence two considerations on the work of lawyers within the legal process. Firstly, they do suggest an expectation that stories begin with a beginning. We expect narratives to start with a brief introduction. Secondly, these abstracts show something of the nature of legal storytelling; whilst we might start an everyday story by saying, ‘let me tell you a story that explains this’, or ‘I know another story about that’, lawyers start (and tell) stories differently. This can be seen most clearly in the abstract to case 18; “Sir, there is an aggravating feature”. All three abstracts are focused upon the legally relevant details of the case. The narrative is a legal one, that tells the story from a legal perspective. While this is, in some senses, a trite statement (what else are lawyers going to do if they don’t tell legal stories?) it does give an indication of what to expect from prosecution narratives.

7.2.2 The orientation

Orientation clauses in narratives set the scene; they introduce characters, the setting and the time, before proceeding to what happened next. While orientation clauses can be distributed throughout a narrative, most are grouped together at the beginning (immediately following the abstract), with a few later orientation clauses utilised to introduce new characters or scenes. Within the mode of trial

hearing, it is normal for the orientation clauses to be grouped together at the start. For instance, in case 59, the prosecutor opened with an abstract (the recommendation) and then introduced the characters:

Prosecutor: Both the defendant and the complainant at the time of the matter are inmates at [a young offenders institution]. They were at the gym, five-a-side football match. They were on opposing teams.

This orientation introduced the central characters to the narrative, explained the location of the incident and what the participants were doing at the time. However, there is little of the character development associated with mainstream narrative forms; the audience was given the minimum details needed to interpret the complication that follows. Unlike everyday narrative forms, there was no subtle introduction of the characters and their role; the prosecutor was much more explicit on this point, labelling each character – defendant and complainant – in a way that left little to the imagination or interpretation; the roles for each character being fixed from the outset. Once again, the institutional site of the narrative heavily influences form. The mode of trial hearing is not an opportunity for storytelling per se, but is a forum for making a particular legal decision. Again, this is a trite statement, but nevertheless it assists in the description of a legal process that utilises a particular form of narrative (re)production. However, on some occasions the prosecutor expanded upon these minimum details, such as in case 17. The abstract, orientation and complication are reproduced below:

Abstract/Orientation

Prosecutor: Sir, the ABH is upon his partner [...]

Orientation

What seems to have happened is that they have, she's told him that the relationship is over, she doesn't want him at the premises.

Complication

He forces his way into her address – that's the summary only offence of using violence to secure entry - and she then describes how he assaulted her there so whilst he pushes the door in or kicks the door in, he punches her to the side of her neck which she says causes her to move past. He goes into the living room where the child is – I think the child is about six months old or thereabouts – *he picks up the child in his arms* and kicks the child's bouncer towards her so that he kicks the outside of her right thigh. He then pulls the phone out of the socket, he takes the handset, she says he hit her with the phone handset two or three times to the back of her head. She puts her arms to push him away, he grabs her hand and bites her, she says, on the left forearm. She says he's holding it for about five seconds – she's got a circular purple mark on her left arm as a result of that. He shoves her with the side of his body causing her to move out of the way. *He then picks up the baby's milk, pushchair and what have you. Tries, she tries to take the child back* and he uses his hand to push her right shoulder, causing her to fall onto the bed. Then she says he takes her tee-shirt and drags her into the hallway and says he shook her causing her to fall to the floor. She says he then kicks her to her left outer thigh when she turned around. *He's shouting about the child, not being able to see the child.* She goes into the living room. She says he comes in and stamps on the phone in the living room, runs into the bedroom, *he tries to pick the child up, he tries to take the child as well.* He then punches her to the left temple. She says she's feeling dizzy. She goes into the living room, she collapses on the floor. She says she's there two or three minutes but she doesn't blank out. She goes back into the bedroom at that stage. *He's got the child and the pushchair by then.* She says he runs towards her, pushes her back again into the living room, causing her to fall to the floor, and then he gets the phone wire, she says, and puts the telephone cord over her head and onto her neck. She says, "I

realised he was going to choke me with the telephone cord, I grabbed it and pushed it away to stop him". She describes herself as feeling very frightened. She says he then grabs her arm and swings her, causing her to fall to the bed, and at that stage *he goes off and I think he took the child*.¹⁹⁸

While the orientation section in this narrative is more complete than that outlined as typical in case 59, the mere details given are still insufficient for a full understanding of the interaction. While the three details outlined – the assault is said to take place against the defendant's partner, the relationship is now over and the complainant no longer wants the defendant at the address – provide some context to this incident (this is a case of domestic violence and the relationship between the parties is breaking down). Many more questions need to be addressed to enable a thorough understanding of the context of the incident. For instance, we could ask why the relationship is over? Who, if anyone is to blame for this? Why does she no longer wish to see him at the premises? Does she have something to hide, or is she afraid of him? Does he have a right to be at the premises or an interest in being there?

The orientation section in this narrative failed to address adequately any of these (and other) questions, yet there was an indication of a wider context in the text. Throughout the complication, orientation clauses told another tale (these have been highlighted in the text) and these referred to the existence of a child who was present during this encounter.¹⁹⁹ Taken as a whole, it is most likely that this

¹⁹⁸ The highlighted sections reveal the underlying child custody dispute.

¹⁹⁹ Such clauses do not necessarily have to sit within their respective sections: "it is theoretically possible for all free orientation clauses to be placed at the beginning of the narrative, but in practice, we find much of this material is placed at strategic points later on" (Labov, 1972: 364-5).

incident resulted from an argument over custody of the child; both parties picked up the child on at least one occasion, he complained about not being able to see the child and he eventually left with the child. An appreciation of this possible context, however, simply leads to more unanswered questions; does the defendant have a right to take the child and does he have good reason for doing so?

The analysis so far suggests that narrative (re)productions delivered by prosecutors in court are partial and fail, therefore, to reflect adequately what has occurred. While this is to some extent inevitable – as a (re)counting of events, narratives flatten reality when describing the important features of an event – legal narratives are prone to intensify this process. The mode of trial hearing, being concerned with one particular legal process, the venue decision, situates narratives within this institutional structure. Much of the human interest in case 17 is lost; the courtroom participants don't need to hear this information when assessing the defendant's case. All that is needed is an outline of the *legal* case against the defendant, along with an evaluation of how this fits in with an understanding of the mode of trial decision. In short, the prosecutor is making a specific recommendation on trial venue.

Contextual information may be supplied in the orientation if this forms a relevant part of the case. For instance, in case 61, the defendant is alleged to have caused trouble in a breakers yard; the prosecutor noted in the orientation that the incident took place against the backdrop of “previous trouble” between the parties. The defendant had been excluded from the yard on a previous occasion

due to his behaviour. While this may help place the incident within a context, it is one that is unfavourable to the defendant, as it presents this incident as part of a prolonged conflict. The context supplied is therefore still focused upon the mode of trial decision, thereby supporting a view that the institutional context plays an important role in the framing of prosecution narratives.

7.2.3 The complication

The complication is the main body of a narrative; it is here that we find the narrative clauses that (re)produce past experiences in a sequence of clauses that describe the events central to the narrative (Labov, 1972). The complication (or a string of narrative clauses) is the only essential feature of a narrative: “[o]nly... the complicating action is essential if we are to recognise a narrative. The abstract, the orientation, the resolution, and the evaluation answer questions which relate to the function of effective narrative” (Labov, 1972: 370).

While complication clauses are usually grouped together, both in everyday narratives and those observed, it is not unusual for orientation clauses or evaluative clauses to be interspersed throughout the central events.²⁰⁰ If we return to the text of case 17, we can see how the prosecutor inserted a number of evaluative statements into the text of the complication. For instance, after stating that the defendant forced his way into the house, the prosecutor evaluated the legal significance of this action by pointing out how this was an incidence of “using violence to secure entry”. Later, the prosecutor noted the age of the child

²⁰⁰ Indeed, it is an important feature of effective evaluation that the storyteller pauses and evaluates so as to reinforce the importance of the central action.

after stating that the defendant entered the room where the child was situated. After describing the bite by the defendant, the prosecutor noted how “she’s got a circular purple mark on her left arm as a result of that”. Finally, towards the end, the prosecutor suspended the narrative to describe how the complainant felt, thereby reinforcing the impact of the incident: “She says ‘I realised he was going to choke me with the telephone cord, I grabbed it and pushed it away to stop him.’ She says she was feeling very frightened.” These pauses serve three different functions. Firstly, the prosecutor evaluated the defendant’s conduct to highlight the legal implications of the defendant’s actions (using violence to secure entry). Secondly, the comment on the age of the child, while also highlighting an important legal feature in that it aggravates the offence, also described the moral context of the defendant’s actions. Finally, and this is an exemplary method of storytelling, the prosecutor suspended the action to describe the full impact of the defendant’s actions upon the complainant, but importantly, this was done in the complainant’s words. She feared that she was going to be choked, and she was very frightened. These three different clauses all suspended the action so as to either evaluate the narrative or describe the result of an incident. We can see, therefore, how effective storytellers will insert these clauses into a complication when narrating events.

Given that this is an important storytelling device, it is unsurprising to find these used in other narratives in the sample. So for instance, the prosecutor in case 38 inserted into the complication the legal implications of the defendant’s actions:

Prosecutor: ...it seems that he punches out towards either her or her friend. *Technically that means there was an assault in any event.*²⁰¹

Similarly, the prosecutor in case 18 suspended the action to explain the meaning of the incident for the mode of trial decision:

Prosecutor: To read various extracts from her statements; “he grabbed hold of my legs, dragged me off the settee onto the floor and then started to kick me in the legs and on my backside and continued by kicking me on the side of my head.” *On that last feature, I’m sure the court will have concerns as to jurisdiction.*

Finally, in case 39, the prosecutor highlighted the emotional impact of the assault upon the complainant:

Prosecutor: He grabs her wrists saying don’t push me, don’t make me hit you. She’s telling him that he’s hurting her. *She’s frightened she says and crying.* He then grabs her hair with one hand and her coat with the other and she alleges that he pushed her head against the passenger window. *She was very frightened, more so than before.* She was asking him to let her go.

While most of these clauses are result or evaluation clauses, they are interspersed within the complication to reinforce the impact of central narrative actions. However, such clauses are also frequently grouped together, both within everyday narratives and those found in the mode of trial hearing.

²⁰¹ This incident differs from that outlined in case 17 as this assault was not charged as a separate offence.

7.2.4 The result

The result clauses inform the audience of what finally happened to the central characters in the story. Labov suggested that the result is usually delayed until after the evaluation clauses; the narrator concludes a story by stating what finally happened, after pointing out the meaning of the narrative through the evaluative clauses. However, within the mode of trial hearing, the result frequently preceded the evaluation; this can be explained on the basis that result clauses (especially for offences against the person cases) often contain information used to evaluate the events. In this sense they are also quasi-evaluation clauses. For instance, case 18 displayed a typical result section for offences against the person:

Prosecution: The injuries are detailed as follows: “my lip is swollen, I have bruises on the top of my head, my wrists are also slightly red and bruised, I’ve got bruises on the top of my leg.”

The prosecutor here utilised the victim’s words to describe the result of the assault. If a trip to hospital were required then this would be highlighted at this time. In short, when describing the injuries and outlining what happened, the prosecutor was also describing an important feature of the allegations: the harm caused.²⁰² Most mode of trial hearings for assaults had a section where the prosecutor outlined the extent of the injuries, even if these were not expanded upon for evaluative purposes.

²⁰² The injuries caused are an important consideration in the mode of trial decision.

Other prosecutors went further than outlining the injuries when telling the court what finally happened. Some described the actions of the police upon arrival at the scene, or disclosed the details of any police interview. Such matters, while in no way central to the legal aspects of the decision, do close the chapter as they inform the audience of the eventual outcome. For instance, in case 18 the court was told that, “the police attend, other matters follow”; these related to a summary only public order offence and an assault on the police. Likewise, the prosecutor in case 38 referenced “some problem with the police subsequently”. While both statements drew the narrative to an end, they also served another function; they helped to describe the general lawlessness of the situation, justifying the intervention of criminal justice professionals. As for the police interview, the statement by the prosecutor in case 39 is typical of this approach:

Prosecutor: The defendant does make some admissions in interview; he says he may have grabbed her hair and pushed her against the window, he denies head butting and suggests that anything he did do may have been in self-defence.

An examination of result clauses gives an interesting insight into case construction practices. Case 38 is a good example of this:

Prosecutor: What she says is that she has five one-inch long scratches on the left side of her neck; there’s some blood drawn, a bite mark on her right cheekbone with two puncture marks that drew blood, bruising and slight swelling as a result of the bite and she is happy for the police to see her medical records.

Two observations can be made about this section of text. Firstly, it shows how prosecutors make observations directly from the witness statement.²⁰³ After describing the injuries received, the prosecutor continued to read from the witness statement and therefore indicated to the court that the complainant was happy for the police to access her medical records. This information has no bearing upon the decision, but was necessary because it enabled prosecution authorities to conclude the exact nature of any injuries received. It is suggested that the prosecutor simply kept on reading. Secondly, it highlights the important role that the police command in the preparation of witness statements. The construction of these parts suggests official assistance; the precise nature of this statement – five one-inch long scratches to the left side of the neck – evidences this involvement. The statement regarding access to medical records is technical usage that also suggests assistance. This is a common feature of witness statements. Nearly all complainants outline their injuries in this way, as all witnesses of public order offences note how they fear for their personal safety; this evidences how the defendant's actions in such cases actually caused in another the fear required for the offence. The role of the police in constructing witness statements was clearly acknowledged in the defence solicitor's representations in case 86:

Defence Solicitor: Now this is a three and a half page statement which goes into some detail. Had she had stitches I would have assumed that quite properly that any decent police officer would have put that in the statement.

²⁰³ Due to workload demands, prosecutors may simply read relevant sections in the courtroom.

For dishonesty offences, it was commonplace for further details to be included within the result. For instance, in case 14, an allegation of burglary, the prosecutor noted how the defendant's fingerprints were found on electrical equipment. Similarly, in case 5, the prosecutor remarked how the defendant was apprehended after traces of his DNA were found at the scene of the burglary, and in case 11, the prosecutor noted how the defendant sold a cassette player, allegedly stolen from a car, for 30 pounds. These are all examples of hearings where, to this point, no mention had been made of the defendant. So in case 14, the prosecutor previously outlined that this was an allegation of domestic burglary, during the day, when the occupier was out and force was used to gain entry. The result in these cases performed the function of linking the defendant to the case – being apprehended with the property or finding fingerprint or DNA evidence firmly tied the defendant to the allegations. For other offences, the defendant was clearly central to the action; for instance, a complainant or witness described the details of an assault perpetrated by the defendant, or a police witness described how the defendant was found in possession of a weapon. Yet, for some dishonesty offences, it was rare to find the defendant at the scene of the crime; some other evidence linked the defendant and the crime. The existence of such a link can be made explicit in these cases in the result. The prosecutor can tie the alleged incident to the defendant by noting how evidence was utilised to apprehend the defendant. While these wider details of the legal process (the investigation of the case and the apprehension of the defendant) were not necessary for the mode of trial decision, they did operate to locate the defendant within the narrative.

7.2.5 The evaluation

In the evaluation, the narrator informs the audience of the reason for the story. In the mode of trial hearing, the events are retold so that the court can make a decision on venue; the evaluation is focused upon this reason for the narrative. It has already been seen how evaluative clauses can be distributed throughout the text of a narrative. These external evaluation devices, according to Labov, can be phrased in a number of different ways. The narrator can explicitly stop and inform the audience of the point of the story; an interpretive remark can be attributed to the narrator at the time of the actual incident; the narrator as principal may quote himself as addressing other characters in the narrative; or the narrator can narrate an evaluative action (i.e. what the character actually did rather than said) (Labov, 1972). In the mode of trial hearing, the prosecutor has a limited number of evaluation devices at her disposal; as she was not present at the scene, two of the devices are unavailable. She cannot attribute an interpretive remark to herself, nor can she quote herself as addressing other characters.²⁰⁴ However, it was most common to find evaluation clauses grouped together at the end of the mode of trial hearing, along with the prosecutor's recommendation. Here, the prosecutor was performing this function much more explicitly. The following, from case 38, is typical of an evaluation section. The prosecutor noted all the main features of the allegation, and how they tied together to suggest the recommendation:

²⁰⁴ Labov also identifies internal evaluation devices that depend upon, inter alia, tone, context and the nuances of the voice. They are identified as lexical, syntactic, phonological and paralinguistic devices, and include intensifiers (heightened stress, variation in pitch range and intonation) and the use of comparators (negatives that did not, but could have occurred).

Prosecutor: Your worships, if you take the prosecution case at its highest, we have the pulling out of earrings, which could actually cause very serious injury, although fortunately didn't in this case, and a bite to the cheek, so we've got the use of teeth as a weapon, they're complete strangers to each other – they're not known to each other – and of course it's the town centre in a nightclub, and we have, what on the face of it, the complainant is suggesting unprovoked violence. I'd have to ask you, in all seriousness, whether the case is one suitable for magistrates' court trial.

7.2.6 The coda

Labov suggested that the coda operates to “bridge the gap between the moment of time at the end of the narrative proper and the present” (1972: 365). The coda effects a clear indication that the narrator has ceased telling the story and therefore normal turn taking conventions are restored. The recommendation therefore usually operates as a coda, because at that point the narrative has performed its function and the courtroom regulars are aware that the defence solicitor is then at liberty to make her representations. Nevertheless, some prosecutors will occasionally make an utterance that resembles a coda. For instance, in case 38, the prosecutor closed by stating, “[y]our worships, there is nothing else really that I can usefully say”.

7.3 Narrative forms

In the mode of trial hearing, prosecutors utilised different narrative forms at differing times. These usually fell into one of three different categories: full or complete narratives; truncated or brief narratives; and finally prosecutors may

not deliver a narrative as commonly understood at all. Each of these different forms will be examined in turn.

7.3.1 Full narratives

Some prosecutors in the sample displayed propensities to storytelling, delivering complete and extensive narratives, while others only utilised this form for difficult decisions. Case 38 provides a good example of an extensive narrative, where the prosecutor expanded upon the details of the allegations and made frequent pauses to either evaluate the events or speculate upon gaps in the witness statements:

Orientation

Prosecutor: As far as the assault is concerned, the incident happened in Kudos nightclub - it goes back to [a date]. The complainant says that she was there with various friends. She says she's not drunk, although I would have to say that she seems to consume rather a lot in the way of Vodka. Around seven drinks which contained Vodka in greater or lesser extent. It is unclear what the time might be...

Complication

...but she says she hears a man standing to her right, saying something along the lines of you're a slag - that seemed to be directed at her friend and not her. She says something back to the man. And what she then alleges is that he reaches over to her with both hands and he pulls her earrings out.

Result/Evaluation

Her ears then bled, but fortunately he hasn't badly damaged her skin because the clips on the back popped off. I think they are pierced ears your worships and the butterflies

have actually come out, fortunately, or otherwise it is thought that they could be pulled right through the ears.

Complication

She says he then ran from the dance-floor, she followed and they are now near to the area where the toilets are. As far as she was concerned, he then turned around and bit the right side of her face on her cheekbone and she can feel his teeth digging into her skin. She wanted to get him off - she says she struggled and tried to punch this man, but she is not aware if any punches made contact. The moment passed, somebody pulled him off and what then happened is that she seemed to be expelled from the nightclub, her friend was expelled and it seems the man as well was expelled. Something is then said at the entrance - it seems that he punches out towards either her or her friend.

Analysis

Technically that means there was an assault in any event.

Complication

And then, your worships, there is some problem with the police subsequently.

Result/Analysis

What she says is that she has five one-inch long scratches on the left side of her neck; there's some blood drawn, a bite mark on her right cheekbone, with two puncture marks that drew blood, bruising and slight swelling as a result of the bite...

Analysis

...and she is happy for the police to see any medical records.

Result/Analysis

It seems as far as the police can tell that at the time she didn't wish to make a complaint – they did speak to her, but whether it's been all through the drink, I'm not sure, but at

that point she wasn't saying that she probably wanted to complain, but she did subsequently.

Analysis

Your worships, if you take the prosecution case at its highest, we have the pulling out of earrings which could actually cause very serious injury, although fortunately didn't in this case, and a bite to the cheek, so we've got the use of teeth as a weapon. They're complete strangers to each other: they're not known to each other, and of course it's the town centre in a nightclub, and we have what, on the face of it, the complainant is suggesting unprovoked violence. I'd have to ask you, in all seriousness, whether the case is one suitable for magistrates' court trial. Obviously, there are some features that might make it unsuitable.

Coda

There's nothing else really that I can usefully add.

Result/Analysis

The defendant was subsequently arrested; I think really that he put up something of a struggle, but basically he is saying that she attacked him, along with her friend, but obviously that's a matter for another court to decide, not you today.

Coda

There is nothing else that I can really say your worships.

Analysis

There is one thing that I haven't told you which may be of some relevance is the complainant is 19, oh she's 18 - not especially young, she's not a juvenile certainly, but the sort of age that you might expect to be at a nightclub.

Coda

Your worships, there is nothing else really that I can usefully say.

The prosecutor frequently interrupted the flow of the narrative to evaluate the incident or comment upon the actions of the parties. The prosecutor noted the drinking habits of the parties, their co-operation (or lack of) with criminal justice agencies, drew inferences from the age of the complainant and generally left little to the imagination. In short, the prosecutor was engaged in storytelling. All narrative details were disclosed, from the most serious allegations to the technical (and maybe trivial) assaults. Interestingly, however, even when engaged in storytelling practices, the prosecutor remained largely focused upon the legal implications of events. Those fringe details not specifically relevant to the decision at hand still concerned the legal process. The prosecutor commented upon the potential effect of removing the earrings (the potential for injury), the “technical” assault, the “subsequent problem” with the police (a summary only public order matter and an allegation of assaulting a police officer), the consent given to the authorities to access records and the subsequent arrest and interview. While there were other comments on non-legal matters, the overwhelming focus of the narrative was upon the legal process. In other words, even in their most storytelling moments, prosecutors were engaged in the art of *legal* storytelling.

That prosecutors were focused upon the legal process can be seen in more of those rare cases when an extended narrative was delivered. For instance, in case 9, the prosecutor delivers an extended orientation:

Orientation

Prosecutor: The victim of the section 20 is, was catholic, was born in 1933, so he's 68 years of age. At the time of the offence he would've been 65. [The complainant] is a neighbour of this defendant.

Orientation/Complication

Sir, he was reprimanding the defendant's children who were making a lot of noise outside his window. They were shouting "fucking dickhead" at [the complainant] who was asking them to be quiet and not to swear at him. He said "I went to my car and told them to pack it in". At that stage the children left, [the defendant's wife] arrived and she berated [the complainant] for speaking to her children.

Complication

She began to assault [the defendant's wife] – she's not before the court but that's how the matter started. He took hold of her to try and push her off his property. At that stage he said "I'd managed to push her about two paces when I saw her husband running down the road towards us. I could hear him shouting "take your hands off my wife". I turned my attention back to her. The next thing I knew, her husband had jumped from the neighbours drive-way, barged into me heavily, causing me to be pushed back quickly and I banged myself heavily against the wall. I rebounded off the wall and he started to punch me about my face and head. I tried to block these blows with my arms. Whilst this was happening, his wife got behind me and held me around the shoulders so that I couldn't stop him. I struggled to get free and away from the attack. I got free and I fell over and I was disorientated. I saw [the defendant] run off up the park. She stepped over me, broke my glasses and she left too".

Evaluation

He said, "I suffer from angina, I've had two heart attacks in the last 15 years, I have diabetes and I also have a cataract"...

Result

...and he had obviously to go to a hospital as a result.

Evaluation

Sir, what I don't have is a medical report. What I do have is a one page document from the [hospital] saying that he has a head injury and that he was given head injury advice. There was some question of a fractured skull, but I don't have any medical evidence to say that it was fractured, so it may well be that it was a suspected fractured skull but wasn't actually fractured. But, Sir, nevertheless, it was the vulnerability of the victim here, two onto one, punching, in that situation that's not suitable for this court Sir.

The prosecutor could have introduced the central events by noting a conflict between the complainant and defendant that was precipitated by the behaviour of the defendant's children. However, she instead described the behaviour of the children in detail. In so doing, the prosecutor painted an unpleasant picture of the defendant's family life; this context introduced the main action in the narrative. While not strictly speaking relevant to the mode of trial decision, this would have been effective in removing sympathy for the defendant and it also deflected attention from the ambiguity surrounding the victim's injuries.

Continuing with the legal focus inherent in the narratives, it is worthwhile exploring case 46. Here the prosecutor utilised a relatively complete, if brief, narrative so as to outline the alleged events:

Abstract

Prosecutor: Sir, the charge involves a sum of around £24,000 allegedly taken. The prosecution case is this...

Orientation

...the defendant is a financial adviser and one of the people that he is advising is [the complaint] who is a private dentist...

Complication

...and the essence of the case is that he said [the complaint] should invest lots of money in [a company]. He then, the defendant, the prosecution will allege, opened an account in the name of [this company]. The cheque from [the complainant] was paid into that particular account and the defendant, according to his admission, then took the money out...

Evaluation

...because he actually had some debts.

Result

He hoped to be able to pay [the complainant] in due course, but it would appear that no money has been set aside, not before now.

Evaluation

That, in essence, is the prosecution case. It is a substantial sum of money and a breach of trust.

District Judge: Not suitable?

[Prosecutor nods his head.]

Nearly all parts of this narrative focused upon legal aspects of the allegations. The abstract noted the value of property taken; important in considering venue. The orientation described the relationship between the parties; this displayed the

breach of trust inherent in the allegations. The complication outlined how the defendant affected the transference of the property, while the result questioned the defendant's intention to return the property: an implied claim that he did not intend to deprive permanently the owner of the property. There was one passing reference to an alternative narrative – a narrative that would explain why the events took place – and this was the comment that the defendant took the property to repay debts. This alternative narrative was outlined by the prosecutor in the police station while reviewing the files; she suggested that the defendant probably had drinking or gambling debts that explained the offending behaviour. She made a number of sweeping comments that suggested an alternative evaluation of the narrative. She stated that, “men did this sort of thing” to clear debts and that drinking and gambling was prevalent in City's Asian community.²⁰⁵ The court narrative focused upon the elements of the offence and a consideration of venue, while this alternative narrative focused upon crude social stereotypes and common sense as a means of explaining what was alleged to have taken place. This is a good example of how a legal focus results in different narratives from what might be delivered elsewhere.

One further case will suffice for an examination of legal storytelling; case 50:

Abstract

Prosecutor: There are certain aggravating features in the commission of these offences overall, but given the sentencing powers, it may be within the sentencing jurisdiction of this court.

²⁰⁵ The defendant was of Asian origin.

Orientation

The offences, Sir, relate to this defendant establishing an account with a tool hire and sale company. They sell their merchandise to the trade or the public.

Complication

On [a date] the defendant made enquiries about establishing an account in his own name with a view to hiring power tools. A standard procedure was followed and a cheque was presented to the commercial concern involved, and the intention was that this would be retained by the company practically as a guarantee in default.

Orientation

If any account holder defaulted, the cheque would be presented with a view to settling any liability. That sum of a £150 was also the maximum amount under the contract of the value of tools that could be hired, so the cheque always acted as a guarantee for any equipment that was on hire at the time.

Complication

During the following two weeks the defendant hired various items, mostly power tools, and at that stage he remained within the financial limit on the account. However, at the end of the two-week period, the defendant advised the full time manager that there was a delay on a contract that he was working on. In fact no such contract existed. He therefore asked for longer to settle the account...

Evaluation

...this is not unknown...

Complication

...it was granted. That manager went on holiday and thereafter the defendant, on various occasions, [on such dates] for example, the defendant purchased power tools using cheques from the same account. Values £217, £411, £125. For each item a cheque was

issued, and subsequently cheques were to be returned dishonoured by the bank. Enquiries were made by [such a date], [the defendant] wrote to them and offered to settle my account, he enclosed a cheque for £500 to the branch in question and also said that he'd sent a cheque for £785 to the head office, to cover the other cheques in relation to the power tools that had been bought. Both of those cheques were returned dishonoured. The cheque for £500, the defendant had stopped payment for that cheque. Various promises in telephone calls from the defendant thereafter – at one stage the defendant said that he would only pay the debt off if the manager called the police off the enquiry.

Evaluation

Evading promises that were never met, numerous appointments that were never kept.

Result

The tools that had been purchased were never returned. The total value of the tools on hire that is still outstanding is £2,706.

Evaluation

In addition, you have the value of the goods that have been purchased by the dishonoured cheques.

Result

Interviewed, the defendant effectively says that this was a contractual matter between them. No payments have subsequently been made, none of the tools have ever been returned.

Evaluation

Sir, the overall value is under £5,000, but it is over a period of time, and it appears from the prosecution version of events to be a calculated course by the defendant. He must have known, at all stages, that the account cheques would not be honoured. It was such

over a period of time to accumulate property belonging to the hire firm, he was throughout, and he must have been, acting in breach of contractual arrangements.

There are two orientation sections that help make legal sense of the allegations. The first introduced the parties and the second outlined their legal position. There was a description of the defendant's contractual position and his concurrent obligations. The prosecutor therefore began by not only introducing the parties, but also explaining the legal basis of their relationship. The real storytelling took place in the complication: initially this outlined uncontroversial details. The defendant was acting within the limits of the contractual agreement and within what was expected. At this point the prosecutor introduced the twist to the narrative by outlining the first problematic incident; the defendant's claim that he was awaiting payment on a contract that necessitated an extension to the credit agreement. After this initial problem, the prosecutor outlined how the defendant then made a number of additional purchases with dud cheques. Evaluation clauses reinforced the dishonest nature of the defendant's conduct, such as the reference to "evading promises" and failing to keep appointments. The story continued with a description of the result of the police's enquiries; the interview and the subsequent explanation. Finally, the prosecutor evaluated the narrative by highlighting the important case features.

Overall, although this prosecutor utilised a storytelling style, most of the hearing focused upon legal aspects of the case. The addition of the twist, the plot line that clearly indicated where events started to take a sinister turn, is a common narrative tool. Similarly, the prosecutor utilised evaluation clauses that reinforced a negative view of the defendant. However, these were all related to a legal

interpretation of the story. The plot twist allowed the audience to compare the innocent with the guilty – a use of the legal binary legal/illegal – while the evaluation clauses emphasised the dishonest nature of the conduct. These factors linked to the legally focused orientation and show this narrative to be a legal story with definite and specific legal implications.

7.3.2 Truncated narratives

Frequently, prosecutors will deliver what can be called a truncated narrative. These can be truncated in a number of different ways. Either narrative sections are omitted by the prosecutor, or while each section is presented, the prosecutor reduces the events to the bare minimum, losing much of the detail seen in everyday narrative practices.

Case 15 is a good example of a case where all the relevant narrative sections were present yet the narrative was truncated:

Abstract

Prosecutor: The Crown would ask that you accept summary jurisdiction. This involves the theft of a mobile phone...

Complication

...basically she asked the complainant...

Orientation

...who knew her...

Complication

...whether she could borrow it. She took the phone...

Result

...and then allegedly disappears.

Evaluation

Value £50 at most, so therefore summary trial.

Here, there was an absolute paucity of information; there were no details as to the location of the incident, for how long the defendant asked to borrow the phone or how the defendant actually disappeared. There were only three narrative clauses that described the allegations; the request to borrow, the taking and finally the disappearance. Yet, given the low value and the nature of the taking, the narrative contained sufficient information for the bench to make a decision.

Case 42, on the other hand, is an example of where the prosecutor failed to deliver one of the narrative sections, in this case the evaluation:

Orientation

Prosecutor: Sir, the defendant and the victim are known to each other. They were in a public house and...

Complication

...during the course of the evening, the two of them went out of the public house together. The complainant indicates that the defendant, on the way through the door,

head butted him, shoved him to the ground and sat on him, pinning his arms to his side and rained blows about his head.

Result

He received injuries: broken cheekbones on both sides, a broken nose, a bruised temple, a cut inside his mouth, bruising to the right of his head and pain to his neck, back and bottom. He went from the scene, home from the scene, but was sick at home and very unwell, called an ambulance and was then detained in the hospital for two days.

Coda

The prosecution say that this is not suitable for trial in this court.

District Judge: Is this presented, or likely to be presented, as a completely unprovoked assault?

Prosecutor: It is, yes.

District Judge: Do you mean they were apparently friends and they drink together?

Prosecutor: They certainly have been acquaintances and shared each other's company at the public house over a number of months, the victim purchasing drinks for the defendant.

District Judge: Thank you, [prosecutor].

The questions the District Judge asked sought to elucidate information usually found in the evaluation. If one existed, this could have noted the absence of provocation as an aggravating case feature, and combined this with the manner of the assault and the injuries received, as explaining the recommendation. As

this was absent, the District Judge had to search for this information. Therefore, while many decisions were based upon sparse details, prosecutors, except in the most obvious of cases, would evaluate the defendant's actions. Otherwise, the bench would remedy this failure by asking questions.

However, questions were not always necessary; for instance, in case 59 the prosecutor also omitted the evaluation. Nevertheless, the District Judge failed to ask any questions. The difference was that in case 59 the defendant suffered a fractured jaw, was hospitalised for five days and underwent surgery. This case was clearly going to be directed to the Crown Court and so the prosecutor did not need to evaluate the narrative. The facts were expected to speak for themselves.

7.3.3 No narrative

One step further than the truncated narrative is the mode of trial hearing where the prosecutor failed to deliver any narrative clauses. In these hearings, the prosecutor failed to describe the alleged events. Instead, she simply evaluated the cases. Case 25 is a good example:

Abstract

Prosecutor: Well Ma'am, as far as mode of trial is concerned, the prosecution say that this is a matter which you can try here.

Result/Analysis

The injuries complained of are a chipped tooth and swelling in relation to the assault occasioning actual bodily harm.

Analysis

There are no weapons used, although it is aggravated by the fact that it's a late night city centre violence. On that basis, we say that your sentencing powers are suitable to deal with it.

While the prosecutor noted the important case features, at no point did she describe the details of the allegations. This case shows that it is not necessary to describe the allegations in order to make a decision.

Case 87 is another good example of the prosecutor's failure to deliver a narrative:

Prosecutor: Well Sir, there are one, two, three, four, five to six dwelling house burglaries and associated handling and possession of drugs matters. Because of the dwelling houses, the prosecution submit that this is more suitable for trial at the Crown Court.

The prosecutor simply counted the allegations. The case was so clear that the prosecutor did not note that these were allegations of night time burglaries when the residents were at home and asleep in their beds.

7.3.4 Choosing narrative form

While it is difficult to encapsulate how different narrative forms were utilised by different prosecutors, there are a number of rules of thumb that help explain the different approaches. Firstly, different prosecutors have different propensities; one prosecutor within the sample, for instance, nearly always utilised a

storytelling style, while others would frequently abstract from the case its essential features. Nevertheless, depending on the context, nearly all prosecutors would switch between styles. Secondly, workloads could impact upon style; busy court days demanded that business be expedited as much as possible and, as a result, prosecutors would reduce their observations. The Tuesday administrative courts for instance, would handle all the allegations from the previous weekend, resulting in exceptionally heavy workloads. While business would often be moved to other courts (especially if trials collapsed), there was no guarantee that this would happen, so court regulars were aware of the amount of work that needed to be completed. Thirdly, different offence types could be treated differently. The truncated narrative was initially identified in a shop theft mode of trial hearing; these nearly always followed a similar pattern, with the prosecutor divulging no details and simply stating that the case would be suitable for summary trial. As shop theft was regarded as obviously suitable for summary trial, there was little reason for the prosecutor to go into any detail. To some extent, therefore, the most truncated narratives would be delivered for the simplest cases, whereas if there was any doubt as to venue, then a more complete narrative could be expected. These three influences interact somewhat, resulting in no obvious rule as to when a truncated or complete narrative could be expected. Some prosecutors would persist with their style, no matter what the case or the court's workload, while others would adapt to the situation.

That full narratives are not needed in simple cases can be clearly seen from an examination of case 45:

Abstract

Prosecutor: Sir, the Crown would say that this matter is not suitable for summary trial. It involves a taking by the defendant of a police baton, as a result of the police attending the defendant's ex-girlfriends home address and the defendant striking his ex-girlfriend's father on the head with that police baton, causing eleven stitches to a cut on the back of his head.

Orientation

The defendant had gone to the home address of his girlfriend threatening, demanding the continuation of the relationship and demanding she give him money...

District Judge: I probably don't need to hear any more.

The prosecutor for this case did have storytelling telling propensities that were a product of her desire to be thorough and well prepared. She gave a thorough abstract (so thorough in fact that for most prosecutors this would suffice for the hearing). We know that this is simply the abstract that introduces the narrative because the prosecutor moved to introduce the parties and the scene of the incident before describing what occurred. Recognising that the prosecutor was about to deliver a full narrative, the District Judge intervened and indicated that he agreed with the recommendation. Obviously, all the District Judge needed in this case was the extent of the injuries and these being so serious the decision was regarded as straightforward. While such representation sufficed for the hearing, the voices of those involved in the incident have, for the time being, been silenced.

In case 43, the prosecutor once again effectively delivered a truncated narrative without meaning to: before she could continue the District Judge indicated that he would decline jurisdiction.

Prosecutor: Sir, I would be asking for Crown Court trial...

District Judge: Yes

Prosecutor: ...for both of these matters in view of the value...

District Judge: Yes, I agree.

The District Judge decided on the value of the goods – over £45,000 – that he would decline jurisdiction.²⁰⁶ The prosecutor was delighted; both the researcher and prosecutor spent most of the morning reading the witness statements, so as to understand these complex dishonesty allegations of stealing and handling cars. The prosecutor was about to start a complete narrative with this abstract; more was to follow. However, as this was undoubtedly regarded as a straightforward decision, the complex facts were reduced to a simple statement on the value of the goods concerned.

It is not always possible to truncate a narrative effectively in this fashion. For instance, in case 21 where the allegations were of making threats to kill, the assumption that the decision was straightforward did not apply. That cases are regarded as easy can be explained on the basis that there is a shared stock of

²⁰⁶ The prosecutor did not need to highlight the value, as this would have been apparent to the District Judge from the charge sheet.

knowledge that assists in interpreting the cases. When this stock of knowledge does not exist, then assumptions on how the case will be understood no longer apply.

Abstract

Prosecutor: Sir it's an allegation that the Crown would submit is suitable for summary trial.

Orientation

Effectively Sir, the complainant in the case, [...], and the defendant were business partners. That was ended by the complainant: he was of the opinion that he was effectively doing all the work, paying all the bills and the defendant wasn't effectively paying his way within the business. At the end of it, the defendant took exception to this and he believed that [the complainant] owed him a sum of money: somewhere in the region of £22,000. That's by way of background Sir...

Complication

...on [a date], [...], the complainant, was in [a] shopping centre with some friends. There's a chance meeting with the defendant who approaches him, grabs him by the arm, and effectively frogmarches him out of the [...] shopping centre saying, "you're going to take me to your house and you're going to give me the £22,000 or I'll kill you". In the course of the frogmarching, he's taken out of the [...] shopping centre and then being walked towards [an] estate, holding him tightly by the arm. During the course of which there is a repeated threat, which the complainant says he took very seriously and was in fear for his safety. Sir, their journey takes them on to [another] street and near to the police station, and as they get there the complainant manages to free himself, runs into the front office and complains to the police. So that effectively is the allegation...

Coda

...I would submit that your sentencing powers are sufficient.

Defence Solicitor: Yes, it's an allegation that's going to be denied quite vehemently Sir. So far as the court regards mode of trial, matters could be dealt with summarily and my client would be happy with that.

District Judge: [To the legal adviser.] Do we have any Thomas Sentencing Guidelines that we can refer to?

Legal Adviser: Sir, we do downstairs, I'll just see if there are any relevant cases in Stone's.²⁰⁷ [Legal Adviser reads Stone's and passes to District Judge pointing out extract].

In this hearing there was little in the way of evaluation, although the prosecutor gave some history to the interaction in the orientation. Any evaluation would be expected to draw attention to the seriousness (or otherwise) of the allegations. As seen above, this can be omitted if the case is regarded as straightforward and unworthy of extra comment. However, it is doubtful if the common stock of knowledge important for such cases actually exists for allegations of threats to kill. They do not appear as a specific offence in the Mode of Trial Guidelines and most prosecutors preferred to proceed with an alternative charge.²⁰⁸ As a result, the infrequency of such cases most probably has not allowed for a common perception to take hold and the usual comfort of working within knowable boundaries no longer applies. As a result, the District Judge had to ask for advice. Interestingly, a similar process did not occur with a similar threats to kill case (83) in the County sample. The bench simply accepted the prosecutor's

²⁰⁷ Stone's Justices' Manual, Draycott et. al. (2003).

²⁰⁸ There is a perception that the necessary intention to kill in these cases is difficult to prove.

recommendation that the case was suitable for summary trial on the bare details provided by the prosecutor.

A similar communication breakdown was observed in case 26:

Prosecutor: Sir, suitable for this court to deal with. The heroin was found was a small amount; 0.53 grams for personal use. As far as...

District Judge: Sorry, 0 point...

Prosecutor: 0.53 grams.

District Judge: Right.

Prosecutor: As far as the matters as to the spray are concerned, Sir, both were recovered from the defendant when he was arrested - there's no suggestion that they were used. Therefore suitable for this court.

District Judge: What are the guidelines on the CS gas canister.

Legal Adviser: Imprisonment Sir, I think on conviction but generally it's okay to deal with it. Right then, I'll see if I can refer to a particular case Sir. [The Legal Adviser starts to look through one of his books and states] I believe that custody, Sir, is the starting point.

Defence Solicitor: I'll concede that.

District Judge: I'm just concerned about the venue.

Legal Adviser: Well Sir, I can't find the case that I had in mind that gives reference to the noxious gas, but I am fairly satisfied that as it wasn't being used Sir, that it will fall within the powers of this court, given the six months' sentence that you can impose.

Defence Solicitor: I think the situation generally is that if there is no evidence at all that it's going to be used, or has been used, or that it's brandished during arrest - that type of situation - then under normal circumstances the court will deal with it. In this case, obviously the court can have a combined sentence of up to twelve months in any event. The amount of heroin is a tiny amount.

District Judge: Mmm.

Defence Solicitor: But the knuckle duster these days isn't unusual now but certainly the CS gas is not an uncommon thing.

District Judge: Well, if that's the guideline case.

Defence Solicitor: It's my experience, I'm not sure if...

Legal Adviser: I could make further enquiries Sir if you wish to be...

Legal Adviser: I'm just checking now Sir if that's alright [Legal Adviser is looking through Stone's].

District Judge: What section is the offence?

Legal Adviser: It's under the Firearms Act Sir.

Legal Adviser: Sir, the record Stone's gives is towards the use of firearms in the ordinary sense of the word, as opposed to CS gas which isn't helpful. There may be a

case in Thomas' Sentencing Guide, Sir, downstairs that might give a more accurate information...

District Judge: I'll deal with it.

Legal Adviser: The point remains that you have twelve months of course.

The prosecution narrative mostly consisted of evaluative clauses that highlighted her view of the case and what she felt were the non-serious nature of the allegations. The important observation is the inappropriate use of truncated narratives in some cases. They seem to work adequately in a context of shared assumptions and familiar patterns, but once something different occurs – here it was the charge of possessing a CS gas canister – the participants are uncertain how to proceed. The legal adviser was searching for an appropriate case, the District Judge was acting on a hunch that six months' imprisonment would be insufficient, whilst the defence solicitor was trying his best to assure the District Judge that he could accept jurisdiction. In the end, given the lack of any guidelines, the District Judge had to make his decision on the basis of the defence solicitor's "experience".

7.3.5 Implications of different narrative forms

While there may be good institutional reasons for the particular narrative forms utilised by prosecutors, their effect was to silence the narrative's characters. The defendant was silenced in many different ways; the bench made their decision on the basis that the prosecution could prove their case and as a result, defence

solicitors infrequently addressed the court. Additionally, we can see from case 17 examined above,²⁰⁹ how the narrative (re)production practices of the prosecutor lost the context to the narrative that may have explained what took place. If the defendant had a story to tell as part of this process, this was not raised in the hearing. The merits of the child custody dispute that underpinned this incident were absent. As a result, both parties were silenced. The most disturbing feature of the hearing, however, is that the prosecutor's representations are designed to reflect the incident from the complainant's perspective. The norm that the bench is to assume that the prosecution can prove their case, means that the mode of trial hearing is one of the few occasions where the victim can have their story told in court unchallenged. Yet, the process operated in such a manner so as to radically distort their narrative. Once again, this was at its most obvious with truncated narratives,²¹⁰ but it also operated when the prosecutor engaged in storytelling.

The first site of narrative (re)production is the police station. Upon contacting the police and complaining, the witness tells her story; the police must take this and form it into a legal narrative in the witness statement. It has already been noted how these statements were indelibly marked through police recording practices with legal terminology. Witness statements and other evidence were then used to construct a case summary that lay at the front of the prosecution file; in this summary the case was abstracted to a brief narrative that recorded the essential features in the case. However, this was not the end of the (re)production process;

²⁰⁹ See section 7.2.2.

²¹⁰ Almost to the extent that some of these hearings have a Kafkaesque air to them, where it is unclear to all but the courtroom regulars what is the subject of discussion. Kafka's, *The Trial* (1935) is a very good literary examination of the dread that can be caused from confusing legal processes.

file review necessitated another filtering process whereby salient case features were identified from the case summary and the statements. What appeared in court was therefore a representation of a representation of a representation, with the associated procedure of review, selection and abstraction amending the victim's narrative to one that was more appropriate for the legal process. However, this was not simply a legal process; case review was not a value neutral process whereby successions of disinterested professionals reviewed from a distance. Rather, each review was undertaken by an interested party who had a stake in the process and was situated within the context of her particular institution. The prosecutor's context can be seen most clearly in cases of domestic violence where the most serious transformation of narratives took place. These will be examined shortly,²¹¹ but before that can be achieved, it is necessary to examine in greater detail the legal narratives that have been produced.

The end product of the prosecutor's work accorded with legal and professional considerations. The prepared text was not designed to be an entertaining story, or a faithful account of "what happened"; rather, it was the preparation of a legal case against the defendant. The lawyers selected those facts that accorded with legal precedents and presented these as a legal case. Throughout the texts of the mode of trial hearings, for instance, it was possible to identify a number of recurrent themes; it would be misguided to suggest that these were simply offered by witnesses and complainants to the police, who then recorded these and passed the case to the prosecutor. The police and prosecution chose what was

²¹¹ See section 7.3.6.

relevant from the complainant's narrative and a case was then constructed for the courtroom. The examples above all show how prosecutors frequently omit details and condense the case down to its bare bones. Yet, the benches were usually able to make a decision despite such sparse information because the prosecution had focused upon the important case features that were necessary for the decision.

Another problem with the truncated narrative is what can be omitted; the prosecutor controls access to information. This was a problem in case 33 and only addressed when the defence solicitor intervened. The prosecutor in this case delivered a standard truncated narrative. She explained that the defendant was acting as a nightclub doorman and the complainant was a guest. She noted how the complainant was punched several times by the defendant and then outlined the injuries; stitches were required and bones were broken in the fingers and wrist. The prosecutor closed with a recommendation that the case was not suitable for summary trial. The defence solicitor, however, noted a problem with the version of events described by the prosecutor; a witness statement that he received from the prosecution suggested that the broken bones might have been self-inflicted as a result of striking a wall. The prosecutor then had to acknowledge this problem; in effect, the truncation process in simplifying events glossed over the ambiguities and problems in the case.²¹²

²¹² A further ambiguity was not addressed. The prosecutor noted how the defendant was working as a doorman and the incident took place as part of his employment. This must be an aggravating feature, as the defendant is employed to ensure the safety of the nightclub customers not threaten that safety. Yet the witness statement makes it clear that the defendant and complainant were friends. This suggests a slightly different interpretation of events but the truncation process masks such fine details.

The extent of truncation in the mode of trial hearing is highlighted by a comparison between bail applications and mode of trial hearings. Case 1 assists here; the defendant was charged with making threats to kill and witness intimidation and the prosecutor mistakenly opened with a request to remand in custody:

Prosecutor: Sir, the Crown do ask that you consider remanding this young man in custody and I perhaps...

District Judge: Mode of trial Miss [Prosecutor]?

Prosecutor: Oh, mode of trial, I do beg your pardon, I'm going the wrong way.

Abstract

Entirely suitable for this court Sir, no weapons just verbal threats.

Orientation

I will in a moment give you the full history, as you've heard already I will be applying for a remand in custody...

Complication

...but he is reputed to have shouted at this young lady witness, "I'll get you, I'll kill you for grassing me up" and "if you don't have those kids with you, I'd take you somewhere and murder you for grassing me up" and as the car drove away he shouted back to her, "and don't forget I'll be back"...

Evaluation

...which takes one out of the realm of conditional. Sir, those are the very brief facts that I would say that this court is suitable to deal with it.

This short hearing says a lot about the perceived place of the mode of trial hearing in the court's schedule and of the narratives that were told. This was another truncated narrative; there was little indication of any relationship between the parties – the complainant was a witness in another case against the defendant – although this could be implied from the substance of the allegations. The prosecutor even went so far as to note the delivery of “very brief facts” and that “the full history” would be disclosed later in her bail representations. An expanded history was indeed delivered as part of the bail representation.²¹³ This use of expanded narratives (when compared to the mode of trial hearing) for bail hearings was observed throughout the research and was due to a number of reasons. The bail hearing was regarded as important. While quantitatively it was a relatively infrequent occurrence (few defendants were remanded in custody), the effects of a custodial remand – immediate custody before trial – were apparent to all courtroom participants. A denial of bail not only results in a loss of liberty, but also has important consequences. Defendants remanded in custody are more likely to be convicted, more likely to receive custodial sentences (and this is true after allowing for other factors) and any such custodial sentence impacts upon future sentencing decisions (Hucklesby, 2002). While there were implications associated with the mode of trial decision,²¹⁴ the defendant's ability to elect somewhat militated against these and there remains the immediate impact of the bail decision.

²¹³ It is by no means clear if the prosecutor's observations on bail could be described as the “full history”. While inevitably more detailed, there is no reason to believe that the processes that operate upon narrative (re)production within the mode of trial hearing will not shape bail applications.

²¹⁴ See Chapter 2.

Bail hearings display a sense of urgency because of this immediate impact. When denied bail, the defendant is taken downstairs to the court cells to await transportation to prison. The dramaturgical features of this decision are clear to all: the defendant and supporters frequently express their emotions. This needs to be contrasted with the mundane in the magistrates' court; the steady processing of cases towards a future outcome. While outputs are the focus of magistrates' courts, they can be in the distance, remote and far from view. Moreover, this conveyor belt is relentless: each professional's workload adds to the pressure to keep things moving. Therefore, when the outcome is apparent and near, as is the case with a bail hearing, there is good reason to expect an immediate focus.

The bail hearings also examine an alternative subject matter to the mode of trial hearing: the bail hearing is *offender* focused, while the mode of trial hearing is concerned with the *offence*. The mode of trial hearing is directed towards the allegations against the defendant and personal factors, such as previous convictions, are specifically removed from consideration. All of the *important* case factors, identified in Chapter 6, are offence focused. In contrast, the criteria for considering bail – the likelihood of absconding, the threat of committing further offences and the risk of witness intimidation – are offender focused. The defendant's actions will therefore be examined, when considering bail, from a perspective that places those actions within a wider context. More of the defendant's personal history will inevitably be considered, along with a fuller analysis of the background to the allegations. Moreover, the defence solicitor is able to question and challenge the prosecutor's recommendations, thereby adding to the narrative before the court.

Taken together, this helps explain the time spent upon the bail decision by the courtroom regulars when compared to the mode of trial hearing. It also assists in an understanding of the truncated and partial narratives that are seen within the mode of trial hearing.

7.3.6 Distorting the story: Domestic violence

Although not an ubiquitous feature of domestic violence cases, there is sufficient evidence in the sample to suggest that the management of these cases was such as to raise concerns about how these were handled. The evidence suggests that prosecutors manipulated difficult evidence to ensure that these cases remained in the magistrates' court; only very rarely was a domestic violence case deemed unsuitable for summary trial. Before examining these cases, it might be worth taking some time to examine why this might be a favoured prosecution tactic.

Nationally, the treatment of domestic violence cases is a cause for concern and this was also the case at the time of the fieldwork process (Crown Prosecution Service, 2001*b*). The Mode of Trial Guidelines are clear that cases of domestic violence should be handled in the same way as every other offence of violence and the Director of Public Prosecutions issued a press release²¹⁵ shortly after the cessation of fieldwork, confirming that domestic violence was an aggravating feature:

²¹⁵ Announcing a new concerted drive to respond to domestic violence cases.

I want to make it as clear as I can that the CPS views the fact that an assault was perpetrated upon a family member as an aggravating factor. It amounts to a fundamental breach of trust since everyone has a right to feel safe in personal relationships.²¹⁶

The local CPS office shared this concern; early in the research process a City team meeting was observed where the local branch discussed the problems of domestic violence cases. Prosecutors expressed concern that complainants were indicating a desire to withdraw from proceedings; usually after reconciliation between the parties. Privately, prosecutors expressed frustration with the victims of domestic violence, while publicly they explored methods of continuing with prosecutions in such cases, including continuing despite the withdrawal of co-operation. Some even suggested that charging complainants with an attempt to pervert the course of justice may convey a message that prosecutors did not appreciate such withdrawals. Whatever the methods adopted, the identified problem was clear; prosecutors almost expected domestic violence cases to be discontinued before completion, largely due to a lack of engagement on the part of the complainant with the process. Indeed, at the time of the DPP's press release, *The Guardian* suggested that, "[n]early half of domestic violence cases are dropped before they reach the court, and almost four fifths of these are dropped because the woman withdraws the complaint."²¹⁷

If the prosecutor is expecting a withdrawal, this may well impact upon the management of the case by the prosecutor in one of two ways. Firstly, the prosecutor may lack a degree of empathy for the victim, leading to a distancing

²¹⁶ 28 November 2001.

²¹⁷ 29 November 2001.

between the complainant and prosecutor. Indeed, a certain degree of cynicism on the part of prosecutors towards complainants in domestic violence cases was observed. While some prosecutors may well have expressed concern for the victims of domestic violence, the expectation of reconciliation weighed far more heavily. Secondly, the expectation of withdrawal could be expected to result in a concern with practical and administrative matters over justice considerations. In order to avoid the work associated with committal proceedings, prosecutors may well choose to recommend that the case remains within the magistrates' court so as to minimise workload. Additionally, given the numerous costs of the Crown Court alluded to in Chapter 2, prosecutors may wish to avoid this extra expense by keeping the case within the magistrates' court. In short, a prosecutor who lacks empathy with a particular class of complainant may well choose to favour more administrative concerns when deciding venue.

The cases that will be examined shortly do point towards an approach whereby the prosecutor minimised the impact of some relatively serious cases, in order to ensure that the case remained within the magistrates' court. While this may well dovetail with administrative concerns, it does raise some particular issues for the narratives of the participants within the initial interaction. Voices were lost in the clamour to save money, and more importantly, justice was not being done. The concerns of victims of domestic violence, already hesitant to engage with the legal process,²¹⁸ surely deserved a response that acknowledged the full extent of any harm inflicted.

²¹⁸ See Lewis (2004) for a recent analysis of legal interventions into domestic violence and an analysis of women's thoughts on legal intervention.

Additionally, these cases also offer an insight into the agreement between the prosecutor's recommendation and bench's decision, reported both by this study and those concluded earlier. The following examples suggest that some cases are retained in the magistrates' court despite the existence of some really serious case features on the basis of skilful management and presentation by the prosecutor. This, combined with the evidence above on truncated narratives, suggests that prosecutors are able effectively to manage and control the information that is placed before the court, thereby controlling the decision making process. As prosecutors were able to tell the story in a particular manner, and this narrative pointed to a particular solution, this controlling aspect of the process, combined with the institutional position of the prosecutor in the mode of trial hearing, should explain the supremacy of prosecution recommendations. All of these conclusions are obviously only valid if the cases themselves do point towards skilful management and control by the prosecutor; it is to the domestic violence cases that we now turn.

Within case 17, there was clear evidence of impact minimisation on the part of the prosecutor. While part of the text of this hearing has been reproduced above, it is worthwhile re-examining it once again:

Abstract/Orientation

Prosecutor: Sir, the ABH is upon his partner [...]

Orientation

What seems to have happened is that they have, she's told him that the relationship is over, she doesn't want him at the premises.

Complication

He forces his way into her address – that's the summary only offence of using violence to secure entry – and she then describes how he assaulted her there, so whilst he pushes the door in, or kicks the door in, he punches her to the side of her neck, which she says causes her to move past. He goes into the living room where the child is – I think the child is about six months old or thereabouts – he picks up the child in his arms and kicks the child's bouncer towards her so that he kicks the outside of her right thigh. He then pulls the phone out of the socket, he takes the handset, she says he hit her with the phone handset two or three times to the back of her head. She puts her arms to push him away, he grabs her hand and bites her she says on the left forearm. She says he's holding it for about five seconds – she's got a circular purple mark on her left arm as a result of that. He shoves her with the side of his body, causing her to move out of the way. He then picks up the baby's milk, pushchair and what have you. Tries, she tries to take the child back and he uses his hand to push her right shoulder, causing her to fall onto the bed. Then she says he takes her tee shirt and drags her into the hallway, and says he shook her causing her to fall to the floor. She says he then kicks her to her left outer thigh when she turned around. He's shouting about the child, not being able to see the child. She goes into the living room. She says he comes in and stamps on the phone in the living room, runs into the bedroom, he tries to pick the child up, he tries to take the child as well. He then punches her to the left temple. She says she's feeling dizzy. She goes into the living room, she collapses on the floor. She says she's there two or three minutes but she doesn't blank out. She goes back into the bedroom at that stage. He's got the child and the pushchair by then. She says he runs towards her, pushes her back again into the living room, causing her to fall to the floor, and then he gets the phone wire she says and puts the telephone cord over her head and onto her neck. She says, "I realised he was going to choke me with the telephone cord, I grabbed it and pushed it away to stop him". She describes herself as feeling very frightened. She says he then grabs her arm and swings her causing her to fall to the bed and at that stage he goes off and I think he took the child.

Coda

So that is the actual incidence of the assault.

Evaluation

She says, "I was generally concerned for my life, I thought he was going to kill me with the telephone cord, but he let go of the cord."

Result

"As a result of this I have a blue mark to the left side of my temple, a black mark to my left tricep, teeth marks on my left arm", and her back, she says, is covered in bruises.

Coda

So that is the details of the assault Sir.

Evaluation

Obviously the aggravating features are the fact that there is the young child present whilst this is taking place, the bite which has caused obviously, a nasty mark to her arm. There's use of the phone to hit her on the head and there is this incident with the telephone cord, but that doesn't appear to have come to much as she claimed she pushed that away from him and that seems to be the end of that incident. So Sir, you've got in this court, obviously six months and that six months can reflect the fact that you haven't committed him to the Crown Court for sentence. So Sir, I would have said on balance, albeit with the aggravating features, you may feel that your powers of sentencing are sufficient.

Defence Solicitor: Your worships, I appear for [the defendant], while he doesn't agree with that, it's not appropriate at this stage to deal with that. I would agree, however, that it is suitable for summary trial and I draw your attention to the fact that, particularly with

regard to the phone wire, there's no suggestion of marks on her neck. It's obviously a matter for your worships, but I would suggest that it is suitable for summary trial.

It is worth comparing two separate passages in the text. Within the complication the prosecutor outlined an allegation that the defendant attempted to strangle the victim with a telephone cord after she was pushed to the floor. This incident was so serious that the victim noted how she actually feared for her own life. Additionally, the prosecutor, in describing this incident through the use of the complainants' words, added to the drama of the incident. As the prosecutor highlighted, this aggravating feature was also combined with a bite and the presence of a child. Yet, the prosecutor, when evaluating the case, minimised the seriousness of the incident with the telephone cord. Three points are noteworthy in this part of the text. Firstly, the attempted strangulation was described in neutral terms as an "incident" rather than an assault. Secondly, the prosecutor suggested that it "doesn't appear to come to much". While the extent of any injuries is important, the legal analysis suggests that the method of any assault can be an overriding consideration.²¹⁹ The potential effects of strangulation are so severe that this could conceivably be regarded as a case where the potential effects of the actions weigh heavily in any decision. As it was, the prosecutor chose to focus upon the lack of any injury. Finally, the prosecutor stated how the complainant "claimed" that he pushed the defendant away, thereby avoiding injury. This statement created distance between the victim and prosecutor, and also suggested that reliance not be placed upon the claims of the victim. All three points combined succeeded in minimising what could otherwise have been regarded as a serious incident. This work was further undertaken by the defence

²¹⁹ See section 6.3.1.2.

solicitor who, in suggesting that no injury or mark was caused by the incident with the telephone cord, minimised the importance of this part of the allegations.

In another domestic violence case (18), a similar process operated. The prosecutor used direct quotations from the witness statement to highlight the impact of the assault and also paused to evaluate these actions:

Prosecutor: To read various extracts from her statements; “he grabbed hold of my legs, dragged me off the settee onto the floor, and then started to kick me in the legs and on my backside and continued by kicking me on the side of my head.” On that last feature, I’m sure the court will have concerns as to jurisdiction.

While the prosecutor highlighted the aggravating nature of this feature, this was later minimised when evaluating the allegations:

Prosecutor: It is curious, Sir, that on the one hand there is kicking to the head, but minor injuries to the head, a protracted assault in two component parts, albeit the injuries are fortunately minor. So what are your aggravating features? This is a matter which this court could try if convicted on a full facts version and commit the defendant for sentence. I think Sir, in terms of the trial jurisdiction, potentially within the courts.

Once more, the prosecutor minimised the assault by suggesting it was both curious and fortunate that a major assault did not result in serious injuries. This could be regarded as another incidence of the prosecutor creating distance and thereby questioning the events as put forward by the victim. It was definitely a case where the prosecutor focused upon the injuries (or lack of) rather than the manner of the assault. Additionally, in both cases 17 and 18, the prosecutors

made reference to committing the defendant to the Crown Court for sentence. After the presentation of this case, the prosecutor indicated that he thought this a “borderline” decision as the victim was “vague” about the kick to the head and that no serious injury was caused.²²⁰ He stated that while he did not wish to trivialise domestic violence incidents, this was not a city centre night time incident. Additionally, he noted that in borderline decisions he may refer to the defendant’s previous convictions²²¹ as decisive. This defendant possessed 12 previous convictions for offences against the person from 1981 to 1998 and a host of other previous convictions for other offences. Still, the prosecutor failed to recommend that this “borderline” case be sent to the Crown Court.

Although not using the devices highlighted above, the prosecutor in case 3 also focused upon the lack of injuries as important when analysing the actions of the defendant. Here the assault was again alleged to have been perpetrated by a bite and once more, the skin was not broken. Nevertheless, in noting the lack of any serious injury when evaluating the case, the prosecutor still minimised the assault when it would perhaps have been more pertinent to concentrate upon the manner of the assault.

Case 51, an allegation of harassment, similarly raises issues about the use of a knife as part of a domestic conflict:

²²⁰ Note how such vagueness about the extent of injuries did not result in the prosecutor re-evaluating venue in either case 9 or 55.

²²¹ Although obviously these will not be disclosed to the court as the Mode of Trial Guidelines make it clear that these are to play no part in the venue decision.

Abstract

Prosecutor: The point that concerns the prosecution the most here is the reference that you heard in the charge to the use of the carving knife.

Complication

Looking directly at the statement the witness says, “He pulled a six inch carving knife on me and made threats towards me if I continued my friendship” with a male that they were arguing about.

Evaluation

Sir, there are no more details in the statement about that particular incident. It is a little vague and on that basis the prosecution say that this may be a matter which you may consider is borderline for your sentencing powers; this court may be adequate to deal with it and unfortunately, in the absence of any more detail on the incident, I don’t think I’m in a position to take it any higher.

District Judge: That part of the statement, what does she actually say?

Prosecutor: I’ll read that paragraph for you, Sir.

Orientation

“At about 19:30 hours on [a date] I went to [the defendant’s] flat. I took my son [...].

Complication

When I spoke with [the defendant] about [someone else], he became agitated and abusive.

Analysis

[The defendant] is an alcoholic in my opinion and he had been drinking on this occasion.

Complication

I decided to leave, as there was no reason with him. He followed [my son] and I out of the flat towards the lift and continued swearing, and began questioning me about a male friend of mine. At this point he pulled a six-inch carving knife on me and made threats towards me if I continued my friendship with this man. I told him that it was none of his business as we are now divorced”.

There are two important features of this narrative. Firstly, the prosecutor only made reference to one incident. Harassment offences allege a course of conduct that causes harassment, alarm and distress; part of their reasoning is while these individual instances may well constitute separate offences,²²² the sum of these combine so that the course of conduct is more serious than the sum of allegations. In only referring to one incident, even if this was the most serious incident, the prosecutor inevitably lost some of the impact of the allegations against the defendant. Therefore, while on this individual incident the case may well have been borderline, other allegations that were not put before the court could have amended the court’s understanding of the case.

Secondly, the prosecutor minimised the impact of the allegations by creating ambiguity as to what happened with the knife. Before the court hearing, the prosecutor and defence solicitor discussed the case; the prosecutor suggested that the crucial component was the presence of the knife. If this remained in the defendant’s pocket as opposed to “waving the knife around”, then the prosecutor indicated that this would be regarded as suitable for summary trial. The defence solicitor initially approached the conversation on the basis that the defendant was

²²² Assaults have been interpreted in a manner that many of the allegations that amount to harassment, such as abusive telephone calls, can be viewed as assaults. See *Ireland; Burstow* [1997] 4 All. E.R. 225.

alleged to have been waving the knife around. While the prosecutor may have been simply erring on the side of caution, more effort could have been made to be clearer. The prosecutor did not make any reference to the distinction that was outlined to the defence solicitor, as well as failing to offer a firm recommendation. Yet, this case does not comfortably fit with the reasons for the differential treatment of domestic violence cases; as the protagonists were divorced, there was little chance of the reconciliation that might have led to withdrawal. Additionally, the co-operation of the victim was not central to the prosecution of this case; a police officer was present when the defendant was alleged to have abused the complainant over the phone and the conversation was heard on a loud speaker.

The prosecutor's control of information put before the court was also important when considering the domestic violence allegations in case 67, where the defendant was charged with making threats to kill. The mode of trial hearing consisted of the prosecutor noting some essential case features; the presence of children was described as an aggravating feature and the prosecutor noted that there had been an earlier assault. These sparse details were utilised to recommend that the case was suitable for summary trial. In the absence of a complication, the District Judge asked how the threats took place. When the prosecutor suggested that the defendant might have had an axe in his possession, the District Judge unsurprisingly asked if the axe was used. We saw in Chapter 6 how allegations of threats to kill are aggravated by the possession and use of a weapon, to the point that the court will, in all probability, decline jurisdiction in such cases. It was at this point that the prosecutor backtracked somewhat; she

stated that the evidence was unclear, although there was no suggestion that the defendant swung the axe. The District Judge noted the borderline nature of his decision, but he nonetheless accepted jurisdiction.

However, the witness statement suggested that the version of events described by the prosecutor did not accord with those alleged by the complainant. The victim said that the earlier assault consisted of the defendant pinning her to the floor by holding the axe handle across her neck and she was only released when the children started to cry. The defendant released her so she could attend to the children and it was when so doing the defendant made the threat. He stated, “don’t think it’s over; I’m going to fucking kill you”. In one sense the prosecutor gave an accurate version of events; the witness statement was unclear as to the position of the axe when the threat was made and he probably was not swinging it at the time. However, such a reading is more than generous to the prosecutor; this case was effectively managed so as not to include the allegations that aggravated the offence. The silence on the earlier assault with the axe handle, an important context to the later threats, minimised the allegations. Indeed, the prosecutor initially outlined the allegations in such a brief manner that no mention was made of the axe until the District Judge asked further questions. Furthermore, this case in some respects fits into the domestic violence paradigm. The relationship between the defendant and his common law partner was described in the case summary as “volatile”. This may have suggested to the prosecutor a degree of uncertainty as to whether or not the victim would proceed and this, combined with the difficulty of proving allegations of making threats to

kill, suggests a clear motivation for the prosecutor to keep the case in the magistrates' court.

Once again, in case 88, the prosecutor made a recommendation that did not fit with the Mode of Trial Guidelines. The defendant was alleged to have held a wallpaper scraper to his wife's throat, while pushing her down onto the sofa and saying, "who hasn't the guts to do it now. You'll squeal like a pig when I cut your throat". Elsewhere, the use of similar weapons was seen as an aggravating feature, to the extent that the court would decline jurisdiction, yet in this case the bench decided that it was suitable for summary trial.

Not all cases categorised as domestic violence remained in the magistrates' court. For instance, case 39 was directed to the Crown Court by the bench. The defendant was alleged to have grabbed hold of his partner, hit her head against the window of the car they were in and then against the handbrake. Finally, the defendant was alleged to have head butted her resulting in a loss of consciousness. When evaluating the case, the prosecutor focused upon the head butt: "this is an allegation of head butting – the use of the head as a weapon – and I would have to say in all the circumstances I really don't think it's a case particularly suitable for magistrates' court trial". While the head butting was no doubt a serious assault, there was no reason why it should have been viewed any differently from a bite. However, there are aspects of this case that suggest that it did not raise the same concerns as other domestic violence cases in the sample. The conflict was not one between co-habiting partners; hence the chance of reconciliation, and therefore withdrawal, was lower. Additionally, the prosecutor

stated that the relationship was at an end; this was further evidence of the lack of permanence to the relationship that commonly leads to complainants withdrawing statements. As a result, the institutional pressures upon the prosecutor are less likely to weigh on the mind.

Similarly, case 58 was directed to the Crown Court:

Abstract

Prosecutor: Sir, as far as these matters are concerned, I would say that they are not suitable for summary trial.

Orientation

The complainant in this matter has had an on and off relationship for a lengthy period with this man who is the father of her son. Prior to the assault there had been an argument in a public house where she works.

Complication

She returned in the early hours of [the day of the offence]. The defendant got in with some keys she'd asked him to return. He was asleep. She was struck from behind with what she believes to be a hammer.

Result

This caused pain and a lump behind her left ear.

Complication

There was a heated argument and she was again struck by the defendant with the hammer...

Result

...causing a lump below her right eye and a cut to the inside of her mouth.

Complication

She was knocked to the floor and she looked up to see the defendant about to hit her again, but she managed to prevent him hitting her. Damage is then caused to the house, Sir.

Result

She had to attend the [hospital] to be treated for her injuries.

Analysis

I'm afraid I have no details of the medical condition of the complainant, but in any event, the Crown say this matter is not suitable for summary trial in view of the nature of...

[The prosecutor was then stopped before she could finish her submissions as the District Judge asked a question relating to the charges.]

While serious offences were minimised by prosecutors within the sample, a direct assault with a hammer was difficult to explain away! Additionally, the prosecutor within this case was one who was renowned for being thorough and was therefore less likely to manage cases on the basis of workload.

Case 64, an allegation of harassment, was another domestic violence allegation regarded as too serious for the magistrates' court. The defendant and complainant were estranged partners.

Abstract

Prosecutor: Sir, the prosecution represent that this is not suitable for trial in this court.

Orientation

As far as the section four charge is concerned, it's clear that, in actual fact it goes on for some considerable time...

Complication

...involving an incident where the young woman who complains was in a car when the defendant came to the car and grabbed her wrists and tried to pull her out of the car. The complaint was made to the police and eventually the police escorted her home and her companion in the car is also separately escorted home because of the defendant's threats and his behaviour on that occasion. There was also an incident where he went to where she was staying with her sister, he brought a friend, there were threats made and eventually a window was smashed.

Orientation/Complication

There have been a number of different statements made by the young woman, who had withdrawn them on each occasion, until the most recent one where she itemises all the incidents going back over a considerable period and the reasons for withdrawing.

Evaluation

It's quite apparent that there have been a number of serious threats which she fully believed would be carried out against her. They are repeated threats, they all form part of the harassment. There is also physical violence which is incorporated within the harassment charge.

Result

There does not appear to be any lasting physical harm that is apparent from the statement, but her psychological well-being is severely affected by the defendant's behaviour over the period of the charges.

Evaluation

Sir, as you can see, the bundle of the statements is quite substantial.

District Judge: Are all the statements from the complainant?

Evaluation

Prosecutor: Yes they are, yes. There is also County Court involvement and injunctions to keep the defendant from her.

The prosecutor's representations were based on the totality of the course of conduct alleged against the defendant; so whilst the prosecutor was not able to point to any one really serious incident, the volume of allegations was such as to lead to the recommendation. Additionally, some of the perceived problems with domestic violence cases did not apply here; while the complainant withdrew on earlier occasions, the reasons for withdrawing were given in this new statement. Also, as the complainant had also initiated civil proceedings, she had already displayed a degree of fidelity to legal remedies, suggesting that she would see these proceedings through to the end.

It would have been difficult for the prosecutor in case 35 to minimise the allegations. The defendant was alleged to have banged his partner's head off a

wall around 20 times, kicked her to the head and ribs, head butted her, and squeezed her hand until the bones fractured.

7.3.7 Alternative approaches

One of the criticisms of the predominant narrative approach is the translation of everyday narratives: those that come to the law tell their stories to professionals, who then translate this narrative into legally relevant categories and this process is influenced by institutional pressures. Yet, while storytelling within the courtroom may enable victims, witnesses and defendants to feel that, at the very least, their story was aired, this would carry with it important implications. Firstly, narrative styles within the courtroom may be unwelcome because of the time used in such an approach. Truncated narratives fit with the busy workload of city magistrates' courts where professionals are under pressure to ensure that cases are processed. Others view prosecutors and defence solicitors that tell stories as longwinded and idiosyncratic. Secondly, such an approach may well be regarded as raising irrelevant details; case 19 highlights the issues at stake:

Abstract

Prosecutor: Your worships, the circumstances of the case are these.

Orientation

It's about ten to midnight on [a date]. The police are called to the area. They drive into [a road] from [another road] and what they actually see is this...

Complication

...they see a male who is obviously [the defendant], he's holding a wooden rounders bat in his right hand, standing over a male. The man is bleeding from a cut to his head with blood running down from his face. The police pull up and stop near to the males. They get out of the police car and the man, the man who is subsequently found to be [the defendant] throws his bat to the ground.

Evaluation

Quite where the bat had come from your worships, I honestly don't know.

Result

The other man is still lying on the floor and then what happens is that this defendant is arrested.

Evaluation

The defendant certainly seems to have been drinking, but whether the other man had been drinking, I really can't say.

Complication

The police actually retrieved the video. The police had been keeping a video of the area, had a look at it and that again, was only partially helpful.

Result

The defendant is subsequently interviewed. He claimed he found the weapon on the floor, he wasn't sure where. He claimed that he, your worships, was intervening in some fight, some trouble I believe, but basically he denies that he was using this bat as an offensive weapon.

Evaluation

It's a very strange case, I have to say it is rather unclear precisely how it started. The man lying on the floor doesn't seem to want to make a complaint. Quite how that could happen, one simply doesn't know. The video apparently shows a man on the floor apparently trying to defend himself. It seems that at some point [the defendant] spits on the man while lying on the ground. There's no-one else on the street and quite how it started I'm afraid is very mysterious. During the first interview, he says he put down the weapon and chased off some men who had been beating the man up. It's a very difficult case your worships, it's the town centre, it's at night and it's with a baseball bat, but on the other hand the man lying on the floor didn't apparently wish to complain. It's rather a borderline case - it's probably suitable for magistrates' court trial, probably one within your powers. Overall, I would say that it's a case more suitable for magistrates' court than the Crown Court, but obviously that's for you to decide.

The prosecutor, as is very much her style, told the narrative of the case. Other prosecutors may have just described this as an allegation of possession, where the prosecution could not prove that the weapon was used. Because the victim was unwilling to make a complaint, the prosecution proceeded with an allegation of possessing an offensive weapon. Technically therefore, the suggestion of assault, while explaining how the defendant came to be arrested, could not form part of the case against him as the prosecution would be unable to prove this in court. Yet, as part of her narrative style, the prosecutor made reference to these details and others, including the subsequent interview, and the defendant's consumption of alcohol. These were clearly seen as irrelevant by the defence solicitor:

Defence Solicitor: Ma'am, it's a position whereby it was a rounders bat, not a baseball bat. The allegation is that officers come across [the defendant] in possession of the

rounders bat. He's standing over a man who's on the floor. He's asked to put the bat down, he does, he's arrested. The issue will be whether he has a lawful excuse for the possession of that, my client will say that he was in self-defence. Those issues will be argued at trial in due course. What was said during the course of the interview I don't think at this stage is particularly relevant. What I would ask you to consider is whether you feel, if convicted after trial, six months' imprisonment would be sufficient to deal with [the defendant]. I would submit that it is and therefore suitable for this court to deal with by way of trial. Ma'am I don't think there is anything more I can add than that.

The defence solicitor specifically noted the irrelevance of the interview details and suggested that this was a simple case of possession of an offensive weapon, with a cooperative defendant where the weapon was not used. The defence solicitor obviously felt that the prosecutor had drifted away from the particular legal question before the court; we were reminded that the hearing is focused upon legal adjudication and is not a forum for narrative disclosure.

7.4 Alternative narratives

The prosecutor occupies a privileged position within the mode of trial hearing. We have already explored how the Mode of Trial Guidelines state that decisions be made on the assumption that the prosecution can prove the allegations.²²³ As a result, the defence solicitor is not able effectively to challenge the prosecutor's recommendations, if such a challenge is levied at the prosecution's version of events. Defence solicitors, therefore, usually remain seated when asked for their

²²³ The Guidelines note that, "the court should assume for the purposes of deciding mode of trial that the prosecution version of the facts is correct".

opinions on venue.²²⁴ Nevertheless, on a few occasions, the defence solicitor was able effectively to mount a challenge. Linked closely to the silence of defence solicitors is the dependence by the bench upon the prosecution's version of events. We have seen in the discussion of truncated narratives how the omission or presentation of information can be effectively managed by prosecutors so as to fit with a desired recommendation. The only chance that the bench have of countering this problem is by asking questions – and we have seen above how this can sometimes uncover further information – or relying upon the defence solicitor to make a challenge. Defence solicitors can challenge the prosecutor's recommendations in one of two ways; a straight challenge of the prosecutor's version of events or a challenge of the presentation of events by pointing out that vital information from the statements has been misrepresented.

A complete challenge with an alternative version of events to the prosecution was observed on two occasions; cases 86 and 91. In case 91, the defence solicitor was unsuccessful in this attempt. However, the defence solicitor in case 86 built upon a borderline not suitable for summary trial recommendation from the prosecutor to persuade successfully the court to retain jurisdiction. The defendant was alleged to have hit her sister over the head causing “a one-inch cut on the right eyebrow” with “a heavy glass ashtray”. In response to this, the defence solicitor offered an alternative version of events. This was achieved by offering an alternative narrative where the defence solicitor acknowledged that he would

²²⁴ Perhaps more surprising was the way in which defence solicitors failed to negotiate with the prosecution. Courtroom days usually started with defence solicitors queuing to speak to the prosecutor, usually for the purposes of negotiation. However, defence solicitors rarely questioned the prosecutor's recommendation on mode of trial. Rather, they usually asked the prosecutor what they would be recommending and no more. This part of the discussion seemed to be more concerned with information gathering.

like to place the incident within a wider context that was absent from the prosecutor's statement. The defence solicitor, in providing this context, was attempting to explain why the assault happened; part of the explanation concerned the stepfather's provocative actions (thereby suggesting mitigation). The alternative narrative also served to cast the defendant in the role of victim rather than aggressor.²²⁵ The defence solicitor tried to remain within the rules of the game by offering this narrative from the complainant's perspective as one that was corroborated by the prosecution witnesses. Nevertheless, fundamentally these observations were aimed at offering a different narrative as well as an alternative interpretation of the prosecution's narrative. The defence solicitor was successful as the bench did retain jurisdiction.

The only other times that defence solicitors mounted an effective challenge was if they were able to rely upon the witness statements that they received as part of advance disclosure. For instance, in case 33, the defence solicitor was clearly able to minimise the impact of the assault. The prosecutor recommended that the case be directed to the Crown Court on the basis of the injuries received; the victim complained of broken bones in the fingers and wrist. The defence solicitor noted that, according to the statements, the broken bones might well have been self inflicted; there was a suggestion, by a witness, that the complainant punched a wall. The challenge in this case was not completely successful as the prosecutor was then able to rely upon a head wound as justifying the recommendation. Nevertheless, the defence solicitor did manage a partial victory as the prosecutor was forced to amend the basis of their recommendation. This type of challenge is

²²⁵ This case therefore serves as another example of how prosecutor's storytelling practices operate so as to isolate the events from a wider context that could give meaning to the allegations.

more likely to be successful as it recognises the rules of the game; the defence solicitor keeps to the prosecution version of events by relying upon what are otherwise unfavourable witness statements.

7.5 Conclusions

Through an examination of narrative (re)production in the courtroom, this chapter has provided a number of insights into the mode of trial decision. Different narrative forms have been highlighted (full, truncated and absent narratives) that are utilised by different prosecutors at different times. The features of a case (whether or not it is regarded as an easy decision), the propensities of a prosecutor and the pressures of the working environment all influence the uptake and use of these different narrative forms. For example, simple cases presented during a busy court session are likely to be truncated so as to save time and energy. That some cases are tailor made for truncated narratives has been evidenced by the manner in which District Judges will take control of the proceedings and stop a prosecutor from delivering a complete narrative.

The effect of these practices within the courtroom is that the full story of the participants is lost in the process. The most truncated narratives are so reduced that little of the detail in the allegations is put before the court. However, even when prosecutors utilise a storytelling style, the legal focus of the narrative results in a loss of context to the story. For instance, we saw in case 17 how the custody dispute between the parties was only implied in the prosecutor's observations; this detail, while possibly explaining what took place, was

unnecessary for the legal process. As this dispute did not serve any purpose for the mode of trial decision, given the factors that influence this decision, there was little need for these details to be given.

The loss of the complainant's voice was most clearly seen in the domestic violence cases. While the mode of trial hearing is one of the few occasions where the victim can have their story told unchallenged, as the bench decide the issue on the assumption the prosecution can prove what is alleged, the narrative (re)production practices of prosecutors frequently resulted in a minimisation of the allegations. With one eye on bureaucratic and institutional pressures, prosecutors toned down the allegations in order to keep cases within the magistrates' court. While legal considerations usually dominated the construction of narratives within the courtroom, these cases clearly show the influence of institutional pressures. What is more, they also display the privileged place of the prosecutor within the hearing. Through the control of information that is placed before the court, the prosecutor is able to guide proceedings towards a favoured outcome. While defence solicitors would occasionally make an effective challenge to the dominance of the prosecution, more often than not, such challenges were ineffectual, resulting in most defence solicitors refusing to offer any observations.

These findings resonate with the work of McConville et. al. (1991) in *The Case for the Prosecution*. For instance, they state that:

...in a very real sense, the police construct evidence (and sometimes more than evidence). The police have, at a most fundamental level, the ability to select facts, to

reject facts, to not seek facts, to evaluate facts and to generate facts. Facts, in this sense, are not objective entities which exist independently of the social actors but are *created* by them (McConville et. al., 1991: 56).

The police exercise their dominant role because of the dominance they have over the suspect in the police station, through “territorial control”, “enforced detention”, and the “isolation” and “enhanced vulnerability” of the suspect (McConville et. al., 1991: 38). This is said to be utilised, through the interrogation, to create confessions, the dominant form of evidence constructed by the police. The work also resonates with *The Case for the Prosecution* on the role of defence solicitors and control over the case narrative:

...the ambiguities of normal life are rendered one-dimensional by police prosecution practices. The police and courts will not accept the presentation of several competing interpretations, which would allow the adversarial process to flourish...

In part, defence lawyers are simply outmanoeuvred, as we have seen, through police and CPS controlling information, charges and procedure (McConville et. al., 1991: 167).

However, this work notes some important differences. One of the major findings of *Case for the Prosecution* was the way in which the police dominated the CPS, due in part to prosecutorial momentum and case construction practices. While we have witnessed traces of police involvement in the construction of witness statements, the CPS have utilised the evidence given, especially in domestic violence cases, to their own ends. The manner in which the prosecution are able to dominate proceedings also displays some subtle differences. The institutional control comes from the priority of the prosecution case for the mode of trial hearing, rather than control over the suspect. However, the thesis shares with

Case for the Prosecution an understanding of the role of defence solicitors as officers of the court; defence solicitors play by the rules of the game and acquiesce in the prosecutors control of the process. Indeed, one of the major surprises was the way that defence solicitors did not negotiate on mode of trial, but rather accepted the prosecution's position.

CHAPTER EIGHT

CONCLUSIONS

8.1 Overview

The thesis has analysed a particular legal decision – trial venue for either way cases – in a context that seeks to understand the sociological and legal aspects of courtroom processes. The venue decision was introduced in Chapter 2 as one subject to political debate and controversy. While the availability of jury trial is thought to be a fundamental right by many commentators, this right has been seen to be eroded by a succession of legislative and administrative reforms that limited access to the Crown Court for certain categories of offence. Throughout these reforms, pressure has been exerted upon the defendant's ability to elect Crown Court; this right has been seen as problematic, in that it has been exercised in cases where the defendant has either gone on to plead guilty or has been sentenced to a disposal within the powers of the magistrates' court. Nevertheless, while the procedure for determining venue has been reformed, the defendant's right to elect has remained.

Chapter 3 widened the discussion to a review of the literature on magistrates' courts and described both the composition of the magistracy and the comments that have been made on the quality of magistrates' justice. The evidence on the

composition of the magistracy, while in many ways dated,²²⁶ does raise some serious questions for the quality of justice in the magistrates' court. To recap, while gender balanced and generally representative of ethnic minority communities, there is still a social class and age imbalance on the bench. While in some ways this helps explain why some defendants may have a preference for Crown Court trial and disposal, it is also an important consideration for the venue decision. The latter part of Chapter 3 examined the debates on the quality of justice within magistrates' courts and sought to show how commentators have suggested a number of problems with magistrates' justice.

So far, the thesis described the actual decision to be made and how this took place within the context of magistrates' justice that has been described by many as problematic. Chapter 4 attempted to build upon this by widening the discussion even further; it sought an understanding of courtroom interaction that moved beyond a mere examination of legal precedents and the social outlook of magistrates, towards an appreciation of courtroom interaction as influenced by different social domains. Four social domains were identified that influence behaviour: the psychobiological, the interaction, the setting, and the contextual resources of the participants. This model was used to examine a selection of earlier courtroom research reports, so as to understand the approaches of these different studies. Wider theoretical debates were also introduced when examining contextual resources so as to place courtroom interactions within the context of language, storytelling, the nature of law as a social practice and legal discourse.

²²⁶ Although updated through the work of the LCD and now the Department for Constitutional Affairs.

Overall, Chapter 4 sought an understanding of courtroom practice that firmly situated this practice as social interaction within a specific legal site.

After this introduction to the mode of trial decision, Chapter 5 outlined the research methods to be adopted. It described the growth of the research project, the development of the methods utilised throughout the project and defended the use of direct observation as a research tool so as to understand the interaction in situ. Finally, this Chapter also described one of the tools used to examine the data: narrative analysis. Narrative analysis was described as a method that assists in understanding language construction within the courtroom, as well as being faithful to the practices of the professionals within the courtroom.

The data collected within the field was outlined and examined in Chapters 6 and 7. These took two alternative approaches; Chapter 6 looked at the legal aspects of the mode of trial decision, while Chapter 7 looked at the influence of the differing social domains upon action. Chapter 6 was necessary so as to not lose sight of the importance of legal analysis for an understanding of behaviour. While this could have been merged with Chapter 7 – law, and knowledge of law, is an important contextual resource possessed by courtroom professionals – legal rules and understandings are such an important consideration in determining venue that they should be examined independently. Chapter 7 built upon this legal analysis by looking to wider considerations. Sometimes legal analysis was inadequate, so alternative explanations had to be sought – the domestic violence cases were used as a specific example in this regard – while, for other cases, social domains operated more subtly upon action.

8.2 The importance of law

Chapter 6 highlighted the multitude of case factors assessed in prosecutors' and magistrates' decision making process. While some factors were more important than others, they clearly dominated the decision making process. Some case factors, such as the manner of the assault or the extent of any injuries received in offences against the person cases, were highly influential in deciding venue. Likewise, the amount of drugs found in the defendant's possession helped to determine venue. These influences could solidify into local legal cultures whereby certain cases would almost inevitably be processed in a predictable fashion. Allegations of domestic burglary, section 20 assaults, violent disorder, property offences where the value of the goods was over £10,000 and the supply of class A drugs were routinely deemed unsuitable for summary trial. Alternatively, magistrates would nearly always retain jurisdiction in cases of shop theft or theft from a vehicle.

However, despite the importance of the legal factors for the decision making process, there remains an element of discretion in the mode of trial decision. Case factors are not always determinative. These guide the decision making process; hence we see how prosecutors describe the decision as one based upon intuition. Additionally, different factors present in a case can point to different outcomes. For instance, three cases in the sample consisted of allegations of biting. These serious assaults were not all deemed unsuitable for summary trial; two remained in the magistrates' court. Likewise, for driving offences, a near

miss resulted in magistrates declining jurisdiction in the City sample, while the bench in the County cases retained jurisdiction in similar cases. The existence of discretion could also be implied by the manner in which District Judges were more likely to retain cases. The evidence could be used to suggest that District Judges are more robust and therefore more likely to accept jurisdiction in serious and complex cases.²²⁷

It is at the margins of the legal process, when discretion is at its highest, that we see the influence of sociological explanations of behaviour. The domestic violence sample clearly displayed the importance of institutional pressures upon decision making and illuminated the position of the prosecutor within the mode of trial hearing. By managing the information placed before the court, prosecutors were able to minimise some relatively serious assaults, thereby ensuring the bench retained jurisdiction. Cases where the defendant was alleged to have attempted strangulation, held a wallpaper scraper to the throat of his partner, bitten the complainant, made threats while possessing a knife or pinning his partner to the floor with an axe handle were deemed to be suitable for summary trial. Due to an institutional belief that complainants in domestic violence cases withdraw from criminal proceedings, there exists an incentive to keep cases in the magistrates' court, thereby avoiding the cost of Crown Court proceedings and the work associated with committal for trial. However, this pressure was only evidenced in those cases where the prosecutor was able to successfully manage the case. Where the case factors unambiguously pointed to Crown Court trial, the prosecutor recommended that the bench decline

²²⁷ However, as these figures were not controlled for other case variables, this is at most a tentative conclusion.

jurisdiction. In other words, not all domestic violence cases were deemed suitable for summary trial; if the case was far too serious, such as when the defendant was alleged to have hit his partner over the head with a hammer or banged her head against a wall over 20 times, the prosecutor would recommend the bench decline jurisdiction.

The importance of discretion at the margins of the decision making process can also be seen in the charging practices of prosecutors. Some prosecutors would routinely charge summary only offences as an alternative to an either way offence if this adequately reflected the allegations. Assaults occasioning actual bodily harm could be downgraded to common assault or allegations of affray reduced to the summary only offence of threatening behaviour. Such practices would remove the possibility of the defendant electing Crown Court trial in cases where this was thought, for reasons of cost, to be inappropriate. One senior prosecutor would also prefer to proceed with indictable only offences when dealing with really serious allegations. This was justified on the basis of workload; if the case was serious enough for the Crown Court he preferred to send the case immediately to the Crown Court and thereby avoid committal proceedings.

8.3 The nature of law

Chapter 4 theorised on how legal language is constructed within a particular system or discourse, and further, how legal narratives are (re)produced in a particular manner. This work was very much implicit (and sometimes explicit) in

Chapter 7; narrative (re)production practices of prosecutors were examined in a manner that highlighted the control of information, the legal focus of the professionals and the importance of administrative concerns. The silencing of the defendants, witnesses and complainants was apparent in these practices. Yet, it is not clear the extent to which legal practice could operate in any other way as presently constituted. The utilisation of storytelling would be regarded as wasting time and introducing irrelevant details. The frustration revealed by other professionals to those prosecutors who adopted a storytelling approach displays the extent to which such reforms would be resisted.

To highlight the legal processes at work, it is worthwhile to reassess the treatment of domestic violence cases once again, in addition to considering the construction of legal narratives more generally. Prosecutors managed courtroom narratives in a way that accorded with professional and legal concerns. The gap between the cases presented in court and the narratives of the participants resulted from professional practice and the objectives of the legal process. The system of recording, collating, selecting, abstracting and reviewing statements resulted in a translation of the narratives. The text produced was not designed as an entertaining story or even as a completely faithful account of what happened. Rather, it was a presentation of a case, and a one sided case at that.

Throughout all the texts analysed, recurrent themes were identified that displayed the concerns of the professionals. This process of legal construction can also be seen in the omission of information in the mode of trial hearing. Much of the context to the disputes that formed the very material of courtroom work was lost

in the narrative reproduction process. Brief orientations, for instance, resulted in partial accounts, whereby the richness of a narrative was lost. However, this is also functional for the legal system. The prosecutor is able to paint a clear picture of the protagonists and the interaction. Within case 17 for example, we have seen how the prosecutor omitted to describe fully the access and custody dispute that undoubtedly coloured the events. As this was not explained, there was no means of deciding which party had the better claim to custody of the child. Yet the legal decision that had to be made could best be done without this context to the story. The professionals merely had to decide whether the actions of the defendant transgressed the criminal code; the omission of this context helped in the creation of a legal binary, victim/offender or aggressor/defender. By simply describing the actions of the defendant, in the absence of any explanation, the prosecutor constructed a legal case that was focused upon the legal implications of actions; a picture was created of an aggressive male using violence to achieve goals and a passive woman defending herself, her child and her property. While this may be an accurate description of events,²²⁸ the narrative as constructed in court failed to explore any alternative explanation.

Much of the theoretical approach developed in Chapter 4 can help to explain the legal narratives produced by prosecutors and the silencing of the parties that results. Comment was made on how autopoiesis suggests that the legal system “listens” to discourse from other systems. The everyday narratives of the participants are produced in a particular style and legal professionals listen to these narratives with particular purposes in mind. The information that is then

²²⁸ This discussion is in no way designed to apologise for the use of male violence upon their partners.

selected as relevant is that which fits with the objectives of the legal system. Likewise, an examination of narrative (re)production suggested that narratives were framed with 'mental maps' or 'frames' in mind and the narratives thereby produced fitted into this pre-existing schemata. Finally, discourses were said to organise information in a manner that named problems and thereby pointed to a solution. Legal discourse therefore organises information in a manner that suggests a legal solution.

However, such an approach privileges the legal aspects of the decision and the operation of legal processes. Legal processes cannot be seen as a seamless web whereby legal outcomes can be fully explained on the basis of these processes. As has already been explained, the theory generated attempts to place the legal encounter within a framework that appreciates social influences upon behaviour. For instance, Cotterell (1992) has explained how autopoiesis²²⁹ omits such a wider understanding:

Autopoiesis theory encourages us to examine 'how the law thinks', emphasising that its communication system has an existence and capacity for self-renewal independent of the motives and interests of those who work with, seek its influence, produce or avoid or are objects of legal communications. But sociology of law should, in my view, be concerned always with how *people* think and act, within complex patterns of freedom and constraint (Cotterell, 1992: 68-9).

Other aspects of the process therefore need to be explained, not only on an understanding of legal practices, but also on wider sociological grounds. The

²²⁹ This would also apply to an understanding of the Foucauldian concept of discourse.

analysis has shown how these influences have shaped the interaction. Courtroom workgroups, and the particular pressures of the setting have played their part. Shared cultures have shaped interactions and institutional pressures have resulted in specific case management practices.

8.4 Decision making in the magistrates' court

Chapters 3 and 4 examined previous research on the courtroom process and decision making within the courtroom, and therein a model of courtroom interaction was developed. Many of the features of courtroom interaction explored in those chapters can be seen in the data collected in the field. We can see the ideology of triviality, the marginal place of the defendant, the sometimes absurd nature of the proceeds, the importance of individual personality, the influence of courtroom workgroups and court culture, the importance of power, the nature of legal discourse and the manner in which legal narratives are constructed.

McBarnet (1981) theorised on the ideology of triviality in magistrates' courts, an ideology that constructs a view of these courts as unimportant, with the real business of law taking place in the Crown Court. In many respects, we can see reflections of this view within the data. Courtroom business was swift and usually regarded as non-problematic. Courtroom workers processed cases towards an outcome, and the mode of trial hearing specifically was viewed as another administrative hearing, and one deemed to be particularly unimportant. Courtroom workers questioned the wisdom of researching mode of trial and

mode of trial hearings were incredibly short with only the bare details of the case disclosed to the court. The real unimportance of mode of trial however can be viewed in its juxtaposition with bail hearings; bail hearings were regarded as important because of the immediate outcome for the defendant while mode of trial hearings were nothing more than another staging post in the progress of a case.

Carlen (1976*b*) identified the defendant as a “dummy player” in the magistrates’ court; rather than being an actor on the stage the proceedings acted upon him or her. The real force in Carlen’s critique related to the lack of legal representation in magistrates’ courts and how the defendant was therefore unable to effectively manage a defence; given the increase in legal representation any assessment must change. The identification of the defendant as a “dummy player” now has different connotations. Within the mode of trial hearing the defendant played no part, other than to instruct her or his solicitor or make the decision as to election. The defendant is effectively a spectator; the details of the allegations are inspected in court with the defendant merely viewing the proceedings. Additionally, while the defendant may have a defence solicitor to speak for him or her, we have seen how little defence solicitors are involved in the mode of trial process. Linked to this critique is the idea of the magistrates’ court as a “theatre of the absurd” (Carlen, 1976*a*). In many ways, to the outside observer, the mode of trial hearing would in many instances seem strange. Benches, when a truncated narrative is delivered, appear to be making decisions with little, if any, information placed before the court. To the courtroom regulars, these cases are so

mundane and obvious that little more needs to be said, but to anyone on the outside it can only be perplexing.

In Chapter 4 the theory of social domains was utilised to highlight four different levels of social interaction; one of these being the importance of personality. Both Brown (1991) and Hogarth (1971) identified the importance of attitudes in decision making. Whilst it was not possible to construct psychological attitude surveys in the way that Hogarth did, it was possible to observe within the data the importance of individual styles and the differences between prosecutors. More specifically, some prosecutors utilised different presentational styles in the courtroom, and given that these styles influenced content to some extent, and the decisions that were made, we can see how personality impacted upon the decision making process.

Courtroom workgroups were also identified as an important feature of the courtroom setting (Lipetz, 1980). More specifically, these workgroups can, over time, solidify into local court cultures whereby decision making practices are predictable and identifiable as part of the culture. Many research studies on courtroom behaviour have focused upon the importance of courtroom culture in explaining decision making practices (Bottoms and McClean, 1976; Flood-Page and Mackie, 1998; Hedderman and Moxon, 1992; Henham, 1990; Hood, 1962 and 1972; Hucklesby, 1997; Jones, 1985; Tarling, 1979; Tarling et. al., 1985; Rumgay, 1995). The influence of courtroom culture could be clearly seen within the study, particularly in the manner in which cases of domestic burglary, section 20 assault, violent disorder, shop theft and theft from a vehicle were decided. For

other offences, the existence of truncated narratives suggests uncomplicated decision making associated with a local culture. The simplistic nature of the decisions and the way in which courtroom workers uniformly agreed on such decisions all evidenced a courtroom culture. Other aspects of the mode of trial hearing also highlighted the importance of courtroom workgroups. The actions of the defence solicitor, in failing to challenge the prosecutor or engage in negotiation, evidence a courtroom affiliation whereby they simply accept the prosecutor's view on mode of trial. Of course, in cases where the bench accept jurisdiction, the defence retain a right to elect Crown Court trial. Nevertheless, there is still scope for defence and prosecution disagreement when the prosecution recommends that the bench decline jurisdiction and this was infrequently observed.

8.5 Reforming mode of trial

The trend of reform, identified in Chapter 2, is to increase the extent of summary jurisdiction; successive reports and Government proposals have attempted to restrict the defendant's right to elect Crown Court trial in order to save resources and reduce delays. The procedures in the Criminal Justice Act 2003, that are yet to be implemented, are designed to reduce the extent to which defendants elect Crown Court trial and to persuade magistrates to retain more cases. For instance, the increase in the sentencing powers of magistrates' courts and the removal of the option of committal for sentence are both designed to increase the extent of summary jurisdiction. Herbert (2003) has commented upon these provisions and suggested that they do not account for local court cultures. Specifically, Herbert,

when addressing increased sentencing powers, noted a belief among magistrates and other courtroom professionals that magistrates are “already being asked to handle cases at the extreme of their ability” (2003: 322). This suggests that any increase in powers may not necessarily result in more cases being retained if the local court culture is resistant. Moreover, the reform may also suffer from unintended consequences; Herbert (2003) suggested that an increase in magistrates’ sentencing powers may result in net widening. While magistrates may refuse to accept jurisdiction in more cases, they may use these increased powers to sentence more harshly in the cases that they retain. This is a distinct possibility given the increased use of custodial sentences by magistrates over the last ten years (Home Office, 2001b). This thesis, by also highlighting the importance of local cultures, supports Herbert’s conclusions. More specifically, the routine declining of jurisdiction in serious cases, such as domestic burglaries and allegations of violent disorder, suggest that magistrates may well have found the limit of their jurisdiction. Indeed, the treatment of these categories of offences suggests that, rather than continually increasing the extent of summary jurisdiction, these offences could be reclassified as indictable only.

The problem of unintended consequences may also result from the removal of the court’s power to commit for sentence. The thinking behind this new innovation is that if the defendant knows that she cannot be committed to the Crown Court, she is more likely to consent to summary trial. CPS statistics state²³⁰ that in 2001-2002, 29 percent of either way cases that were committed to the Crown Court were the result of the defendant’s election. In this study, the

²³⁰ See Table 2.

comparable figure is 21 percent. Magistrates are therefore responsible, by declining jurisdiction, for the majority of cases that are committed to the Crown Court. This reform, in targeting the defendant's decision, is only addressing a minority of the cases that are committed to the Crown Court. However, its effect may be to increase even further the extent to which magistrates decline jurisdiction. One method used by prosecutors (and legal advisers) in the sample to ensure that magistrates' retained jurisdiction in borderline cases, was to remind the bench of its power to commit for sentence if the defendant was subsequently convicted. If the magistrates were unsure as to the extent of their sentencing powers, they could retain jurisdiction and then reconsider after conviction. However, removal of this option may result in magistrates erring on the side of caution. Given that Herbert (2003) has already noted how magistrates believe that they are acting on the limit of their powers, such a cautious approach is likely.

Other features of the proposed reforms may also be ineffective. Giving the CPS the power to charge suspects, rather than the police, will do little to alleviate the problems identified in Chapter 2. As shown by McConville et. al. (1991), the police, in constructing the case against the suspect, have already operated in a manner that closes down alternative explanations and avenues. The case presented to the prosecution will inevitably suggest the charge, given the manner in which the evidence was collected and collated. However, if this does not prove to be the case, one of the reasons why eventual disposal does not accord with the decision made in the mode of trial hearing, concerns the way in which the mode of trial decision is prefaced on an assumption that the prosecution can prove their

version of events. If a conviction does not result on this factual basis, especially if it is based on a bargain, then any disposal will be based on some other alternative version of events. Altering the manner in which charges are initially laid will do little to change this fact. For similar reasons, the availability of a sentence indication also seems unlikely to affect, to any subsequent degree, the outcome of the mode of trial hearing. If the hearing is prefaced on the prosecution case, as constructed by the police, with no explanation, mitigation or alternative facts, then the bench will receive only half of the story. It could be expected, therefore, that any sentence indication will over-estimate the sentence that may result from a full sentencing process, involving as it does, speeches in mitigation and the preparation of sentencing reports. Defendants are therefore less likely to respond to the sentence indication as expected. As a tool, the sentence indication can only operate where the defendant makes a calculation that it would be better to plead guilty now, rather than continue with the process. If the indication given is unrealistic, then this is unlikely to occur.

Overall, the present form of the mode of trial hearing makes it difficult to amend in a manner that policy makers and government would like. The courtroom workers see it as largely unimportant; it is simply another hearing in the continued progression of the case. As a result, when combined with local courtroom cultures, hearings are truncated and brief; usually, no real details are presented to the court to enable a realistic decision to be made. Instead, courtroom workers expedite the hearing in order to move onto more important court business. Defence solicitors collude in this process and rarely challenge the recommendation of the prosecutors or present information to the court. It is

therefore of little surprise that, as identified by Riley and Vennard (1998) and Hedderman and Moxon (1992), that subsequent decisions do not accord with the decision in the mode of trial hearing. Defendants will be given sentences in the Crown Court within the powers of the magistrates' court when decisions are made on this basis. Quite simply, the prosecution possess too much control over the information placed before the court. While it may be possible to increase the powers of defence solicitors by removing the assumption that the prosecution can prove their version of events, the activities of defence solicitors and their self-identification as officers of the court (McConville, et. al., 1991) suggest that this may have only limited effect. What is more, if this was successful, this would turn mode of trial hearings into something akin to bail applications, with a corresponding increase in length and adversarial conduct. In the busiest magistrates' court centres, it is unlikely that the time and resources needed to effect such a change would be readily available, and already over-worked courtroom workers may resent, and therefore resist, such a change. Those prosecutors who did elaborate in a manner that was regarded as unnecessary were subject to disapproval from the other courtroom professionals.

8.6 Narrative analysis as a research methodology

As explained in Chapter 5, narrative analysis was utilised as a research methodology because it respected the natural state of the data collected in the courtroom, it provided a means by which the representations of prosecutors could be examined in situ and in a manner that did not slice the data into fragments that removed it from its context. In this respect, narrative analysis proved to be a most

valuable tool in courtroom research. It helped display the micro-structures inherent in the courtroom interaction and the importance of the setting. We could see, for instance, in truncated narratives how their form was influenced by the concerns of the professionals and courtroom work schedules. What is more, the influences upon the decision making process were brought into view – in the evaluation section of the narrative the prosecutor presented to the court the most important aspects of the case and understanding this as an evaluation clearly displayed the concerns of the prosecutor. It also helped demonstrate the way in which law (re)produced reality; the means by which messy details were reduced to cases and the discourse of the law.

It also offered a means of highlighting the banal; storytelling is such a universal activity that we fail to recognise its significance; it is so pervasive that we no longer pause to consider how we utilise narrative. Therefore, at one level, analysing narrative seems to offer very little – it simply highlights what we all take for granted. But it is this very fact that makes it so useful. Any lawyer will quickly acknowledge that lawyers tell stories and do so with a legal focus; that much is obvious. However, narrative analysis allowed for an in-depth examination of the form and content of those stories, and led to an appreciation of how form influenced content. Narrative analysis illuminated what was literally apparent, yet somehow hidden due to familiarity. It also raised questions about how the stories could be any different; what else could legal professionals have done and how else could they have constructed narratives, if not with a legal focus? Whose story can and do they tell?

8.7 Finding voices

Courtroom narratives do not really belong to any one party as they are subjected to such diverse influences. The mode of trial hearing is a product of legal communications that are mediated within a particular setting, involving particular personalities, who bring particular contextual resources to the interaction. As a result, it is multifaceted and complex; it is perhaps therefore naive to expect the narratives of the central characters to shine through the hearing. This does, however, raise some serious questions for legal processes. In particular, it leads to the inevitable question, whose process is this? Current political rhetoric suggests that the criminal justice system should be returned to victims and witnesses who the system is supposed to represent.²³¹ Indeed, current trends towards restorative justice are, *inter alia*, praised for the way in which they increasingly involve the victim within a process from which they traditionally have been excluded.²³² Concern with the treatment of victims within the criminal justice is a relatively recent phenomenon. Christie (1977) criticised the criminal justice system for stealing the conflicts from the parties, and in doing so, radically shifting our understanding of their roles:

²³¹ In a recent speech delivered at the University of Birmingham, Lord Falconer, the Secretary of State for Constitutional Affairs, noted how the criminal justice system must serve the public:

“For too long, the courts, the law, and the justice system have been seen as the preserve of their key interest groups. They are not. They play a vital part in everyone’s daily life. That doesn’t mean there isn’t an important role for judges, and lawyers. But what it does mean, though, is that all our changes to the justice system have to be measured by how they serve the public, and that those who run or work in the system are there to give service to the public...

We are working hard so that people in the criminal justice system are treated as individuals with individual needs, rather than expecting them to serve the systems needs.” (Lord Falconer, 2004: 3-4)

²³² For a general discussion on restorative justice, see Johnstone (2002) for a more critical approach, see Ashworth (2002).

We have focused on the offender, made her or him into an object for study, manipulation and control. We have added to all those forces that have reduced the victim to a nonentity and the offender to a thing (Christie, 1977: 5).

Before Christie reminded us of the place of victims in the criminal justice process, they were at best simply regarded as a resource (van Dijk, 1988; Newburn and Merry, 1990; Pointing and Maguire, 1988) or at worst, criminological theory, in focusing upon victim precipitation, would impliedly blame the victim for the crime (Wolfgang, 1958). Christie's call, and the rise of left realism,²³³ has led to a renewed focus upon the place of the victim within the criminal justice process. A succession of different studies have highlighted the failure of the criminal justice system to provide an adequate response to the victim's interests and needs. Victims have received a poor response at the hands of the courts (Brereton, 1997; Rock, 1993) and the police (Newburn and Merry, 1990; Shapland et. al., 1985). This is especially true in the case of vulnerable victims, including victims of rape and sexual assault (Adler, 1987; Chambers and Millar, 1983 and 1986; Lees, 1997), victims of domestic violence (Edwards, 1989; Grace, 1995; Stanko, 1988), child victims (Adler, 1988) and ethnic minority victims (Cooper and Pomeyie, 1988). Commentators have gone so far as to describe victims as suffering "secondary victimisation" at the hands of the legal process (Doak, 2003: 6).

As a result of these problems, policy makers and voluntary bodies have attempted to alleviate the worst excesses of the marginalisation of the victim

²³³ Left realism moved leftist criminology from a conflict perspective towards one that understood the real harm inflicted upon the victim (Lea and Young, 1984).

through the provision of services and increased participation. These include the Criminal Injuries Compensation Scheme, compensation and reparation orders, Victim Impact Statements, special measures to protect the victim in the courtroom, specialist teams to respond to sensitive crimes, Victim Support and Witness Support, rape crisis centres and women's refuges, the reinforcement of needs through the Victim's Charter and restorative justice processes.²³⁴ Edwards (2004) has categorised victim participation in the criminal justice process on a sliding scale from control, through consultation and information provision to expression. Control suggests maximum victim involvement while expression suggests an opportunity for a victim to express their feelings but no more. Initiatives that are designed to address the place of the victim fit somewhere on this scale. So for instance, victims' services such as Victim Support and the Criminal Injuries Compensation Scheme aim to address victims needs but without any formal level of participation, whereas Victim Impact Statements, depending upon how they are used, can be more or less participatory. This scale allows us to see why victims still complain about the level of service given by professionals; services and rights may fail to meet victims' expectations. For instance, Hoyle et. al. (1998) show how the "One Stop Shop and Victim Statements Pilot Projects" failed to live up to the expectations of some of the victims involved in the schemes. In short, they were expecting an input higher on the scale than the pilots allowed. However, as well as continually failing to live up to victims' expectations, these reforms, and an increased focus on the 'rights of victims', may create problems for victims; either victims are used, "in the service of severity" or "in the service of offenders" (Ashworth, 2000: 186). Both

²³⁴ There is a burgeoning literature on the development of these services and participatory 'rights'. A selection includes, Edwards (2004), Sebba (2000), Reeves and Mulley (2000), Erez (2000), Mawby and Gill (1987) and Maguire and Pointing (1988).

forms of “victim prostitution” (ibid) fail to address the age old problem of the abuse of victims for the furtherance of the aims of the criminal justice process. However, to some extent this may be inevitable, but at the very least problems will remain until we fully deal with the tripartite relationship at the heart of the criminal justice process. As Ashworth (1986) suggests, the criminal justice process involves three important relationships; state-offender, state-victim and victim-offender. Historically, the state-offender relationship has dominated policy and criminology, and only recently has the public and private sector and the academy become interested in the state-victim and offender-victim relationship. However, in many respects these three relationships are in tension and it is difficult to reconcile all three interests. So for instance, while restorative justice may focus upon the offender-victim relationship, this may trespass upon values that the state and community regard as key in the administration of criminal justice, such as consistency and the protection of the defendant from the power of the state.(Ashworth, 2002).

If the claims of Government and policy makers are to lead to an increased role for the victim, this may be at the expense of other values and interests in the criminal justice process. However, focussing on the mode of trial process, it presently fails to address either the concerns of the victim or the defendant. Both are silenced by the form of interaction and administrative concerns of the professionals that operate within the courtroom. While Ashworth points to the relationships between the state, victim and offender, this study suggests that the agents of the state, in the manner in which they control the process, dominate in a manner that serves their own bureaucratic interests.

APPENDIX:
DATA CAPTURE FORMS

Name:		D.O.B: __ / __ / __		
Date of first hearing: __ / __ / __		Court list – 1 / 5 / 6 / 7		
Offences Charged:		D of O	D of A	D of C
Ethnic Origin:				
Defendant represented				

Prosecution case from file:

MOT from file:	Prosecutor
Comments from Prosecutor on MOT:	Prosecutor

Review Comments?	Prosecutor
Immediate MOT?	
General Comments:	

Previous Convictions:

Name:		D.O.B: __/__/__
Date of first hearing: __/__/__	Date of Observation: __/__/__	
Offences Charged:		Plea:
Prosecutor – SST / NSST	Magistrates – SST / NSST	
Magistrate(s):		
Prosecutor:		
Prosecutors Representations:		

Defence Representations:

Magistrates Decision and Reasons:

General Observations on PBV hearing:

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